TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 287

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED AUGUST 8, 1931

(36,101)

(36,101)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 287

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

INDEX

	Original	Print
Record from district court of the United States, Northern Illinois	1	1
Caption (omitted in printing)	1	
Petition, case No. 10479	6	4
Exhibit A—Order of Interstate Commerce Commission instituting Rate Structures Investigation, Docket No. 17,000, dated March 12, 1925	52	45
Exhibit B—Notice to the public issued by the Commission in connection with the institution of Rate Structures Investigation, Docket No. 17,000, dated March 12, 1925	59	51
Exhibit C—Notice by the Commission of consolidation of grain and grain products within the western district and for export, Docket No. 17,000, part 7, with certain other pending cases for hearing, dated December 30, 1926	67	57

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 6, 1931

	Original	Print
Exhibit D—Notice by the Commission of assignment for hearing, dated March 28, 1927	71	61
Exhibit E—Report and order of the Commission, July 1, 1930	79	69
Exhibit F—Supplemental report and order of the Commission, dated April 10, 1931	287	275
Exhibit G—Report and order of the Commission in Kansas Public Utilities Com. vs. A., T. & S. F. Ry. Co., October 11, 1923	339	327
Exhibit H—Report and order of the Commission in rates and charges on grain and grain products, July 10, 1924	353	341
Exhibit I—Petition of carriers in western district for rehearing, filed September 6, 1930	433	421
Exhibit J—Statement submitted to the Commission by the Western Association of Railway Executives, dated November 6, 1930	481	468
Exhibit K—Letter addressed to the Commission by a committee of the Western Association of Railway Executives, dated November 26, 1930	517	501
Exhibit L—Petition of carriers in western district for rehearing, filed February 18, 1931	525	507
Order setting cause, etc	558	537
Acknowledgment of service	560	537
Notice of application for injunction	561	538
Order setting cause, etc	564	539
Petition for leave to intervene, B. & O. R. R. Co. et al.	566	540
Order granting leave to intervene	571	543
Petition for leave to intervene, Corporation Commission of Arizona et al	574	544
Order granting leave to intervene	588	548
Petition for leave to intervene, Nebraska State Ry. Commission	590	548
Order granting leave to intervene	595	550
Petition for leave to intervene, State of North Dakota, etc., et al	597	550
Bill and petition of State of North Dakota et al	598	551
Orders granting leave to intervene	605	557
Answer of United States of America	609	557
Answer of I. C. C.	621	564
Answer of Corporation Commission of Arizona et al	631	569
Answer of Public Service Commission of Kansas et al	657	585
Answer of Nebraska State Ry. Commission	689	605
Petition, case No. 10482	697	611
Motion for order consolidating causes Nos. 10479 and 10482	713	627
Order of consolidation	715	628
Answer of United States of America, No. 10482	717	628
Answer of I. C. C., No. 10482	723	630
Affidavit of L. E. Wettling	730	633
Gentry Waldo	738	638
E. V. Peterson	744	642

	Original	Print
Affidavit of Paul Peters	748	644
B. F. E. Marsh	756	649
Patrick J. McCarthy	761	652
A. B. Enoch	766	654
R. S. Outlaw	769	655
C. B. Bee	772	656
W. W. Manning	774	657
Order for temporary restraining order	776	658
Petitioners' proposed findings of fact and conclusions of law	779	659
Proposed findings of fact and conclusions of law on behalf of I. C. C.	798	671
Requested findings of fact and conclusions of law by Public Service Commission of Kansas	812	683
Findings of fact and conclusions of law	816	686
Opinion, Lindley, J., upon motion for temporary injunction	831	698
Orders denying injunction and dissolving temporary restraining order	844	708
Petition for appeal	848	709
Assignments of error	854	710
Bond on appeal (omitted in printing)	866	
Order allowing appeal	872	717
Order enlarging time	877	720
Petition for order extending time	882	721
Notice of appeal	888	723
Præcipe for transcript of record	894	724
Clerk's certificate (omitted in printing)	908	
Citation and service (omitted in printing)	912	
Statement of points to be relied upon and designation to print entire record	926	728

[fols. a & 1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity. Consolidated Cause No. 10479

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al., Petitioners,

against

UNITED STATES OF AMERICA et al., Defendants

In Equity. No. 10479

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, The Beaumont, Sour Lake & Western Railway Company, Bingham and Garfield Railway Company, The Chicago and Alton Railroad Company, and William W. Wheelock and William G. Bierd, Receivers; Chicago and North Western Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago Great Western Railroad Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, The Chicago, Rock Island and Gulf Railway Company, The Chicago, Rock Island and Pacific Railway Company, Chicago, Saint Paul, Minneapolis and Omaha Railway Company, The Colorado and Southern Railway Company, The Denver and Rio Grande Western Railroad Company, The Denver and Salt Lake Railway Company, The Duluth, South Shore and Atlantic Railway Company, Duluth, Winnipeg and Pacific Railway, Fort Smith and Western Railway Company, Fort Worth and Denver City Railway Company, Fort Worth and Rio Grande Railway Company, Great Northern Railway Company, Gulf, Colorado & Santa Fe Railway Company, Green Bay & Western Railroad Company, Illinois Central Railroad Company, International-Great Northern Railroad Company, The Kansas City Southern Railway Company, Kansas, Oklahoma & Gulf Railway Company, Lake Superior & Ishpeming Railroad Company, Los

Angeles & Salt Lake Railroad Company, Louisiana & Arkansas Railway Company, Louisiana, Arkansas & Texas Railway Company, Midland Valley Railroad Company, The Minneapolis and St. Louis Railroad Company and W. H. Bremner, Receiver; Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Missouri and North Arkansas Railway Company, Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas, Missouri Pacific Railroad Company, [fol. 3] Nevada Northern Railway Company, New Orleans, Texas & Mexico Railway Company, Northern Pacific Railway Company, Northwestern Pacific Railroad Company, Oklahoma City-Ada-Atoka Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad & Navigation Company, Panhandle and Santa Fe Railway Company, Quincy, Omaha & Kansas City Railroad Company, San Antonio, Uvalde & Gulf Railroad Company, The St. Joseph and Grand Island Railway Company, The St. Louis, Brownsville and Mexico Railway Company, St. Louis-San Francisco Railway Company, St. Louis, San Francisco & Texas Railway Company, St. Louis Southwestern Railway Company, St. Louis Southwestern Railway Company of Texas, San Diego and Arizona Railway Company, Southern Pacific Company, Spokane International Railway Company, Spokane, Portland and Seattle Railway Company, Texarkana and Fort Smith Railway Company, Texas and New Orleans Railroad Company, The Texas and Pacific Railway Company, The Texas Mexican Railway Company, Toledo, Peoria & Western Railroad, The Burlington-Rock Island Railroad Company (Heretofore Named The Trinity and Brazos Valley Railway Company), Union Pacific Railroad Company, Utah Railway Company, Wabash Railway Company, The Western Pacific Railroad Company, Wichita Falls & Southern Railroad Company, The Wichita Valley Railway Company, The Yazoo & Mississippi Valley Railroad Company, Petitioners; The Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, Boston and Maine Railroad, The Delaware and Hudson Railroad, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, Grand Trunk Western Railroad Company, Lehigh Valley Railroad, The New York

Central Railroad Company for Itself and as Lessee of Boston & Albany Railroad, Cleveland, Cincinnati, Chicago & St. Louis Railway, and Michigan Central Railroad; The New York, Chicago and St. Louis Railroad Company, The New York, New Haven and Hartford Railroad Company, The Pennsylvania Railroad Company, and Pere Marquette Railway Company, Intervening Petitioners,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE Commission, Defendants; Corporation Commission of Arizona, Public Utilities Commission of the State of Colorado, Public Utilities Commission of the State of Idaho, Public Service Commission of Missouri, Board of Railroad Commissioners of the State of Montana, Public [fol. 4] Service Commission of Nevada, New Mexico State Corporation Commission, Board of Railroad Commissioners of North Dakota, Corporation Commission of Oklahoma, Public Utility Commissioner of Oregon, Board of Railroad Commissioners of the State of South Dakota, Arkansas Railroad Commission, Public Service Commission of Wyoming, Nebraska State Railway Commission, State of North Dakota, Doing Business as the North Dakota Mill & Elevator Association, and the North Dakota Terminal Exchange, Board of Trade of Kansas City, Missouri, and Public Service Commission for the State of Kansas, J. W. Greenleaf, Charles D. Shukers, and Thurman Hill, Members, Intervening Defendants

In Equity. No. 10482

TERMINAL GRAIN COMPANY, MORTEN MILLING COMPANY, Stanard-Tilton Milling Company, Universal Mills, Petitioners,

against

THE UNITED STATES OF AMERICA, Defendant

[fol. 5] Be it remembered that the above-entitled action was commenced by the filing of the following Petition and Exhibits in the above-entitled cause No. 10479, in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 29th day of April, A. D. 1931.

IN THE

District Court of the United States

FOR THE NORTHERN DISTRICT OF ILLINOIS,

EASTERN DIVISION.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants.

In Equity.

No.....

PETITION WITH EXHIBITS.

FREDERICK H. WOOD,
WALTER MCFARLAND,
ELMER A. SMITH,
[illegible] GAULT,
[illegible]GLAS F. SMITH,
H[illegible] H. LARIMORE,
J. N. DAVIS,
A. B. MASON,
R. J. HAGMAN,
M. L. COUNTRYMAN, JR.,
R. S. OUTLAW,
LESLIE CRAVEN,
WM. D. WHITNEY,
A. B. ENOCH,
Solicitors for Petitioners,

Room 1025 La Salle Street Station,
Chicago, Ill.

W. F. DICKINSON,
O. W. DYNES,
R. V. FLETCHER,
E. E. MCINNIS,
BRUCE SCOTT,
Of Counsel.

IN THE

District Court of the United States

FOR THE NORTHERN DISTRICT OF ILLINOIS,

EASTERN DIVISION.

IN EQUITY.

The Atchison, Topeka and Santa Fe Railway Company, The Beaumont, Sour Lake & Western Railway Company, Bingham and Garfield Railway Company, The Chicago and Alton Railroad Company, and William W. Wheelock and William G. Bierd, Receivers, Chicago and North Western Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago Great Western Railroad Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, The Chicago, Rock Island and Gulf Railway Company, The Chicago, Rock Island and Pacific Railway Company, Chicago, Saint Paul, Minneapolis and Omaha Railway Company, The Colorado and Southern Railway Company, The Denver and Rio Grande Western Railroad Company, The Denver and Salt Lake Railway Company, The Duluth, South Shore and Atlantic Railway Company, Duluth, Winnipeg and Pacific Railway, Fort Smith and Western Railway Company, Fort Worth and Denver City Railway Company, Fort Worth and Rio Grande Railway Company, Great Northern Railway Company, Gulf, Colorado & Santa Fe Railway Company, Green Bay & Western Railroad Company, Illinois Central Railroad Company, International-Great Northern Railroad Company, The Kansas City Southern Railway Company, Kansas, Oklahoma & Gulf Railway Company, Lake Superior & Ishpeming Railroad Company, Los Angeles & Salt Lake Railroad Company, Louisiana & Arkansas Railway Company, Louisiana, Arkansas & Texas Railway Company, Midland Valley Railroad Company, The Minneapolis and St. Louis Railroad Company, and W. H. Bremner, Receiver, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Missouri and North Arkansas Railway Company, Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas, Missouri Pacific Railroad Company, Nevada Northern Railway Company, New Orleans, Texas & Mexico Railway Company, Northern Pacific Railway Company, Northwestern Pacific Railroad Company, Oklahoma City-Ada-Atoka Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad & Navigation Company, Panhandle and Santa Fe Railway Company, Quincy, Omaha & Kansas City Railroad Company, San Antonio, Uvalde & Gulf Railroad Company, The St. Joseph and Grand Island Railway Company, The St. Louis, Brownsville and Mexico Railway Company, St. Louis-San Francisco Railway Company, St. Louis, San Francisco & Texas Railway Company, St. Louis Southwestern Railway Company, St. Louis Southwestern Railway Company of Texas, San Diego and Arizona Railway Company, Southern Pacific Company, Spokane International Railway Company, Spokane, Portland and Seattle Railway Company, Texarkana and Fort Smith Railway Company, Texas and New Orleans Railroad Company, The Texas and Pacific Railway Company, The Texas Mexican Railway Company, Toledo, Peoria & Western Railroad, The Burlington-Rock Island Railroad Company (heretofore named The Trinity and Brazos Valley Railway Company), Union Pacific Railroad Company, Utah Railway Company, Wabash Railway Company, The Western Pacific Railroad Company, Wichita Falls & Southern Railroad Company, The Wichita Valley Railway Company, The Yazoo & Mississippi Valley Railroad Company,

Petitioners,

vs.

United States of America and Interstate Commerce Commission,

Defendants.

PETITION.

To the Honorable, the Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division:

The petitioners, hereinabove named, suing on behalf of themselves and of all other common carriers by railroad in the Western District (herinafter defined) subject to the Interstate Commerce Act, bring this action against United States of America and Interstate Commerce Commission (hereinafter referred to as the Commission) for the purpose of enjoining, setting aside, suspending and annulling a certain order of the Commission, entered on July 1, 1930, in proceedings entitled No. 17000, *Rate Structure Investigation, Part* VII—*Grain and Grain Products Within Western District and For Export,* as amended by a supplemental order therein, entered April 10, 1931, (said order as amended by said supplemental order being hereinafter referred to as the Order).

For their cause of action, petitioners state:

I.

Since March 1, 1920, petitioners have been and now are common carriers of property and passengers by railroad subject to the Interstate Commerce Act. Many of petitioners have been and now are engaged in the operation of lines of railroad in the Northern District of Illinois, Eastern Division. Petitioners, The Atchison, Topeka and Santa Fe Railway Company, The Chicago and Alton Railroad Company and William W. Wheelock and William G. Bierd, Receivers, Chicago and North Western Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago Great Western Railroad Company, Chicago, Milwaukee, St. Paul and Pacific Railroad

Company, The Chicago, Rock Island and Pacific Railway Company, and Illinois Central Railroad Company, have their principal offices and their principal operating offices in the City of Chicago, in the Northern District of Illinois, Eastern Division.

The defendant, United States of America, is sued pursuant to express authority of the Congress of the United States, as provided in an Act, approved October 22, 1913, known as the District Court Jurisdiction Act, being part of the Urgent Deficiency Appropriations Act.

The defendant, Interstate Commerce Commission, is a public corporation and administrative tribunal created by the Act to Regulate Commerce, approved February 4, 1887, as amended (Interstate Commerce Act), and is specifically charged with the administration and enforcement of the provisions of said Act.

The Order of the Commission was not made upon the petition of any party but in a proceeding instituted by the Commission upon its own motion. The matter covered thereby arose in part in said Northern District of Illinois, Eastern Division.

II.

On the 12th day of March, 1925, the Commission on its own motion entered an order instituting an investigation of the rate structure of common carriers by railroad, subject to the Interstate Commerce Act, entitled "Rate Structure Investigation," No. 17000. A copy of said order is attached hereto and made a part hereof, marked "Exhibit A". Under the same date, the Commission issued a statement "To the Public", a copy of which is attached hereto and made a part hereof, marked "Exhibit B", in which it outlined the scope of the proposed investigation.

Thereafter, the Commission divided Rate Structure Investigation into separate proceedings and limited the issues in each proceeding to the rates affecting the transporta-

tion of a particular description or descriptions of traffic. One of such proceedings, hereinafter referred to as the "grain case" or the "present proceeding", was instituted to cover the rates on grain and grain products within the Western District and the State of Illinois, rates on grain and grain products from the Western District and the State of Illinois, when for export through any ports of the United States, including points on the Rio Grande River, and ex-lake rates on grain and grain products when for export.

The said Western District comprises all of that part of the United States, except Alaska, between the Pacific Coast and a line described as follows:

> The Mississippi River from its mouth to the mouth of the Illinois River, at or near Grafton, Illinois; thence the Illinois River from Grafton to Pekin, Illinois; thence north and east of The Atchison, Topeka & Santa Fe Railway Company from Pekin through Joliet, Illinois, and Streator, Illinois, to Chicago, Illinois; and thence a line drawn in a northerly direction from Chicago to the international boundary, including west thereof the Upper Peninsula of Michigan.

The grain case was consolidated for hearing with certain other pending cases, and on December 30, 1926, the Commission issued a notice to that effect, a copy of which is attached hereto and made a part hereof, marked "Exhibit C". The first assignment for hearing of the consolidated cases was announced by the Commission in a Notice dated March 28, 1927, a copy of which is attached hereto and made a part hereof, marked "Exhibit D". Thereafter, the cases were assigned for hearing and evidence taken at various times and places. The record was closed on September 22, 1928.

On July 1, 1930, the Commission issued its report (hereinafter referred to as the Report) and Order therein, which

Order incorporates the Report as a part thereof by reference, and these were served upon petitioners on or about August 1, 1930. A copy of the Report and Order (as entered July 1, 1930) is attached hereto and made a part hereof, marked "Exhibit E". Pursuant to successive postponements, the effective date of the Order has been set as June 1, 1931. During the month of December, 1930, at which time the effective date of the order was April 1, 1931, the carriers were informally advised that the Commission was considering the issuance of a supplemental report and order. On or about April 10, 1931 (the effective date of the order of the Commission having in the meantime been extended to June 1, 1931), the Commission issued a supplemental report (hereinafter referred to as the Supplemental Report) and supplemental order. The said supplemental order modified in various particulars certain of the rates prescribed and certain of the other terms of the Report and order as entered July 1, 1930 and clarified the same as to many matters in respect of which the previous order of the Commission had been indefinite and uncertain. The said supplemental order was served upon the carriers on or about April 15, 1931. Copies of the Supplemental Report and Supplemental Order are attached hereto and made a part hereof marked "Exhibit F".

III.

Section 15a of the Interstate Commerce Act, added thereto by the Transportation Act, 1920, provides in part as follows:

> "(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under

honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

"(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. * * *"

"(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary."

IV.

(*a*) In *Increased Rates, 1920,* 58 I. C. C. 220, the Commission divided the continental United States into four rate-making groups, designated as the Eastern, Southern, Western and Mountain-Pacific Groups. The Western and Mountain-Pacific Groups, as therein designated, together comprise the Western District, as defined in the Grain Case. In the same proceeding, the Commission determined that the aggregate value of the property of the carriers for rate-making purposes in the Western District held for and used in the service of transportation was, as of December 31, 1919, $8,100,000,000 and that the fair return thereon would be 6% for the two years beginning March 1, 1920, and authorized a horizontal increase in charges for freight services in the Western Group of 35% and in

the Mountain-Pacific Group of 25% and between said groups, or between either of said groups and other groups, of 33⅓%.

(*b*) In *Rates on Grain, Grain Products and Hay,* 64 I. C. C. 85, the Commission ordered the rates on grain, grain products and hay in the Western District reduced by the removal of one-half of the increases authorized in *Increased Rates, 1920,* and further ordered that the rates on coarse grains should be 10% below the reduced rates on wheat.

(*c*) In *Reduced Rates, 1922,* 68 I. C. C. 676, the Commission reaffirmed said basic valuation of $8,100,000,000 as of December 31, 1919, determined the fair rate of return which the carriers were thereafter entitled to receive under Section 15a to be 5.75 per cent., and found that the carriers were not at that time earning a fair return upon the then aggregate value of their properties. The Commission nevertheless required a 10% reduction in all rates of the carriers in the Western District, except in respect of commodities, the rates on which had already been reduced 10% or more, subsequent to the decision in *Increased Rates, 1920,* which commodities included grain and grain products. The Commission has not since said report in *Reduced Rates, 1922,* again determined the aggregate value of the property of the carriers in the Western District or made any change in its determination as to the fair rate of return to be received thereon under Section 15a. Between December 31, 1919, as of which date the Commission found the aggregate value of said property to be $8,100,000,000, and December 31, 1929, additions and betterments to said property were added at a net cost, less retirements, of $2,220,808,869, and between December 31, 1929 and the present time further additions and betterments thereto have been added at a net cost of not less than $300,000,000.

(*d*) In a special report of the Commission to the Senate Committee on Interstate and Foreign Commerce, dated January 21, 1931, the Commission stated that the said determinations of aggregate value "did not reflect in any substantial measure the current costs of reproducing railway properties" but "were made upon much the same plan as was followed in the determination of value * * * condemned by the Supreme Court in *St. L. & O'Fallon R. Co. v. U. S.*, 279 U. S. 461."

(*e*) In its said special report of January 21, 1931, the Commission stated:

> "The railroads have never been able, since 1920, to obtain the aggregate earnings contemplated by section 15a, and they are faced with continually increasing competition from other forms of transportation."

The carriers in the Western District have never since the passage of the Transportation Act in 1920 received the rate of return contemplated by Section 15a of the Interstate Commerce Act as amended thereby. The report and order of the Commission herein were made with full knowledge of said fact.

V.

Subsequent to the decision in *Reduced Rates, 1922, supra,* the Commission took the following action in respect of the general level of rates on grain and grain products in the Western District:

(*a*) In *Rates on Grain, Grain Products and Hay,* 80 I. C. C. 362, decided June 4, 1923, the Commission vacated so much of its order in *Rates on Grain, Grain Products and Hay,* 64 I. C. C. 85, as established a 10% differential between rates on wheat and coarse grains

in the Mountain-Pacific Group and interterritorially between that group and the Western Group.

(*b*) In *Kansas Public Utilities Com.* v. *A. T. & S. F. Ry. Co.*, 83 I. C. C. 105, decided October 11, 1923, a copy of the report in which is attached hereto and made a part hereof, marked "Exhibit G", the Commission found:

(1) That the rate of return upon the aggregate value of the property of the carriers in the Western Group for the year 1922 was less than 4%, and for the first four months of 1923 approximately 4.1%.

(2) That "carriers in the Western Group have been and are now earning considerably less than the prescribed return, and apparently less than the fair return to which they are entitled under their constitutional rights, entirely independent of Section 15a."

(3) That it was improbable that a reduction in the then existing rates would so increase the movement of grain and grain products as to enable the carriers to make up to any appreciable extent the loss in revenue should a general reduction in these rates be ordered.

(4) That the record in said case afforded no basis "even for a suggestion as to a reallocation of the transportation burden."

(5) That many of the rates therein assailed (meaning thereby the rates then in effect) had been prescribed by the Commission; that others were depressed by competition of various kinds.

(*c*) Thereafter, the Commission on its own motion instituted an investigation into the then existing rates on grain, grain products and hay in the Western District,

entitled *Rates and Charges on Grain and Grain Products*, 91 I. C. C. 105. The said case of *Kansas Public Utilities Com.* v. *A. T. & S. F. Ry. Company, supra*, was reopened for the taking of further testimony, and consolidated with said investigation. On July 10, 1924, the Commission issued its report and order in said case, a copy of which is attached hereto and made a part hereof, marked "Exhibit H", wherein the Commission made a most exhaustive examination of all matters pertinent to the said inquiry and made the following specific findings of fact:

"(*a*) That rates on grain, grain products, and hay, generally speaking, are now on a somewhat lower basis compared with pre-war freight rates than are the carload rates on other traffic.

"(*b*) That the earnings per car, per car-mile, and per ton-mile on grain and grain products, compared with other classes of traffic and with all carload traffic, do not show that grain and its products are now contributing more than their fair share to the revenues of the carriers in this group, considering the value of the traffic, the average hauls, the relative services performed, and the ratio of revenue produced by grain and grain products to total carload revenue compared with former years.

"(*c*) That there has been an increase in the average loading of grain and its products in recent years as well as in the average loading of all carload traffic, although not to the same extent in the case of all carload traffic. This factor was given weight in *Rates on Grain, Grain Products, and Hay, supra*, wherein we required reductions to be made in the rates for the transportation of these commodities.

"(*d*) That there has been slow but progressive improvement in the economic condition of agriculture in the western group since 1921, though the improvement in grain-raising areas is less than with respect to other classes of agriculture.

"(*e*) That the present adjustment of rates on grain and its products from the 'element of value' standpoint, compared with the other heavy-loading commodities moving in volume, pointed to by complainants, as profiting by the disturbance in relative values, is not unfavorable to grain and grain products.

"(*f*) That despite a peak year in 1923 from the standpoint of traffic handled, it does not appear that respondents made a fair return, after giving due consideration to the complainants' contentions as to abnormal expenditures for maintenance of equipment, and to the aggregate valuation.

"(*g*) That we have no assurances on this record that there will be such further increases in tonnage or such reductions in operating expenses in the immediate future as to enable respondents to earn an excess over a fair return. Any further reduction in revenue would increase the shortage in the fair return of carriers in the western group.

"(*h*) That large additions to capital must continuously be made by carriers in this group for needed additions and betterments, which can not be done if the credit of the carriers is seriously affected by undue impairment of their net revenues from operation.

"(*i*) That the benefit which would accrue to the average farmer in case of a reduction in rates is small compared with the aggregate disastrous effect on certain of respondents' revenues and on their credit, and there is serious doubt whether farmers would not in many instances lose from impaired railroad service more than they could possibly gain from a reduction in rates, even if the farmers would get the entire benefit of any reduction made."

(*d*) The Report neither reverses nor qualifies any of said findings.

VI.

On January 30, 1925, approximately six months after the said report in *Rates and Charges on Grain and Grain Products, supra,* the Congress adopted a joint resolution, generally known as and herein referred to as the Hoch-Smith Resolution (43 Stat. L. 801), which is as follows:

> "That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.
>
> "That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage, as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities and to make, in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution the Commission shall give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation. In the progress of such investigation the Commission shall, from time to time, and as expeditiously as possible, make such decisions and orders as it may find to be necessary

or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates. Such investigation shall be conducted with due regard to other investigations or proceedings affecting rate adjustments which may be pending before the Commission.

"In view of the existing depression in agriculture, the Commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service: *Provided,* That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the Commission involving rates on products of agriculture, and that such cases shall be decided in accordance with this resolution."

VII.

(*a*) The general level of the rates now in effect, which will be materially reduced if the Order in the present proceeding shall become effective, is the same as of the rates approved in the cases referred to in paragraphs (*b*) and (*c*) in paragraph V hereof and in respect of which the findings hereinbefore in said paragraphs set forth were made.

(*b*) The Order of the Commission is a complete reversal of the action taken in said cases. Neither the Report nor the Supplemental Report contains any findings of any material changes in the pertinent facts since the said cases were decided warranting said reversal. On the contrary, it appears on the face of the Report (1) that the condition of agriculture had improved; and (2)

that during the period considered by the Commission there had been no material improvement in the financial condition of the carriers or in their rate of return since the determination of the aforesaid cases, in which the Commission had held that rates on grain and grain products could not be reduced consistently with the requirements of Section 15a. It also appears on the face of the Report that the rate of return received by the carriers in the year 1927, which was the last year for which figures were available at the time of the close of the record, was but 3.92% on the investment of the carriers in railway property as contrasted with 3.96% in 1923 and 3.87% in 1924. The report of the Commission in *Rates and Charges on Grain and Grain Products, supra,* was made in 1924, and, as appears on the face thereof, based in large part upon the conditions present in 1923. In the present case the Commission did not find that the producer would be materially benefited by the reduction in rates required. On the contrary, it found that the effect upon the producer of any change in rates was more or less speculative.

(*c*) The Commission found that the revenue of the carriers for the Western District received from the transportation of grain and grain products constitutes a substantial portion of their total revenues, being, as appears from the report, 12.1% of their total revenues in 1924, which year was used in the report as representative. The effect of the Order is materially to reduce the general level of rates on grain and grain products in said district. The average reduction in the rates specifically prescribed, as set forth in Appendix D of the Report, as modified by the Supplemental Report and Order, is approximately 13%, and the resulting reductions in revenue to many important carriers in said district would exceed said percentage. The rates prescribed by the Order, if it shall become effective, will cause a reduction of $20,000,000 annually in the gross revenue and in the net railway operating income of the carriers in the Western District.

(*d*) In thus requiring the said rates to be reduced, under the facts and circumstances hereinbefore described, the Commission disregarded the requirements of Section 15a and acted in violation of the affirmative duties imposed upon the Commission thereby. It appears upon the face of the Report (1) that the Commission therein misinterpreted and misconstrued Section 15a and proceeded upon a misconception thereof and of its powers and duties thereunder, and (2) that for the standard imposed by said Section 15a, the Commission substituted a vague and indefinite standard erroneously assumed by it to have been created by the Hoch-Smith resolution for application in all cases relating to the determination of the rates on agricultural products, by reason whereof the Order of the Commission is void and was made in excess of the duties and powers created and imposed by the Interstate Commerce Act.

VIII.

(*a*) The present proceeding was instituted by the Commission on its own motion pursuant to and by reason of the Hoch-Smith resolution. Throughout the proceedings before the Commission the Hoch-Smith resolution was emphasized.

(*b*) On July 20, 1927, in a proceeding entitled *Calif. Growers' & Shippers' Protective League* v. *S. P. Co.*, 129 I. C. C. 25, 132 I. C. C. 582, begun on or about December 27, 1926, the Commission ordered the carriers to reduce the rates on deciduous fruits from California to eastern destinations. As in respect of the rates on grain and grain products, the Commission had theretofore, in a proceeding entitled *Calif. Growers' & Shippers' Protective League* v. *S. P. Co.*, 100 I. C. C. 79, decided June 25, 1925, after a most exhaustive investigation, determined that the

said rates were neither unreasonable nor unlawful and that the same could not be reduced consistently with the requirements of Section 15a. The carriers affected by the said first mentioned report and order of the Commission thereafter brought suit in the District Court of the United States for the Northern District of California to set the order therein aside upon the ground that it was based upon an erroneous interpretation of the Hoch-Smith Resolution and of the Interstate Commerce Act as affected thereby. The said Court sustained the order of the Commission and dismissed the petition of the carriers on January 18, 1928 (30 F. [2d] 940).

(c) Thereafter, on June 2, 1930, (281 U. S. 58) on appeal to the Supreme Court of the United States, the decision of the said District Court was reversed and the said order of the Commission was set aside upon the ground that in the making of said order the Commission had misinterpreted the Hoch-Smith Resolution and the Interstate Commerce Act, in that it had erroneously construed the said resolution as effecting a change in the basic law so as to place agricultural products in a most favored class and to justify a reduction in the rates thereon by reason of depression in the agricultural industry, notwithstanding that the carriers had not made and were not making the fair return for which Section 15a of the Interstate Commerce Act makes provision, and had erroneously construed the said resolution as creating a special and separate standard for the determination of the reasonableness and lawfulness of the rates on agricultural products different from the standards created by the Interstate Commerce Act for the determination of the reasonableness and lawfulness of rates generally and on the ground that the Commission had proceeded upon the erroneous conception that the Interstate Commerce Act and the Hoch-Smith resolution empowered and directed the Commission to reduce the rates on agricultural products, affected by de-

pression, although reasonable and lawful under the Interstate Commerce Act.

(*d*) The decision of the Supreme Court of the United States setting aside the order of the Commission in *Calif. Growers' & Shippers' Protective League* v. *S. P. Co., supra,* was, as aforesaid, rendered on June 2, 1930, and the Report and original Order of the Commission in the instant case on July 1, 1930. The Supplemental Order amended the original Order in the present case in minor particulars only. As appears on the face of the Report, the instant case was submitted on July 1, 1929. The record therein, as appears on the face of the Report, consisted of 53,000 pages of transcript, 2,100 exhibits, and approximately 20,000 pages of briefs, exceptions, oral argument and final memoranda, of which it is stated in said report thorough examination was made. The instant case and the said record were under consideration by the Commission for a full year, and were under consideration for eleven months prior to the said decision of the Supreme Court of the United States, and it appears from the 43rd Annual Report of the Commission to Congress dated November 30, 1929, that the "final report" in said case was then "in course of preparation". The Report as issued, dated July 1, 1930, consists of 156 printed pages, and in Appendix D thereof prescribes over 2,000 specific rates.

(*e*) There are lacking in the Report the basic or essential findings required to support the Order under the Interstate Commerce Act; and none of the facts recited in the Report and to which the Commission gave consideration are sufficient to form a basis for any finding that the existing rates on grain and grain products are unreasonable or unlawful under the Interstate Commerce Act.

In conducting its investigation into the grain rate structure in the Western District, and in making and en-

tering its Order therein requiring said rates to be reduced, the Commission applied thereto not the standards of reasonableness of the Interstate Commerce Act, which the Commission had properly applied in similar investigations prior to the adoption of the Hoch-Smith resolution, but applied thereto standards other than those of the Interstate Commerce Act, which the Commission erroneously believed to have been substituted by the Hoch-Smith Resolution. The Commission misinterpreted and misconstrued the Interstate Commerce Act and the Hoch-Smith resolution and the legal effect thereof, and proceeded upon the same erroneous conception of its powers and duties under the Interstate Commerce Act and the Hoch-Smith resolution, under which it had proceeded in the entry of its report and order reducing the rates on deciduous fruits from California, as more fully set forth in sub-paragraph (*b*) of this paragraph VIII. By reason of the premises, the Order of the Commission is void and beyond the authority of the Commission to make.

IX.

(*a*) The present rates on grain and grain products in the Western District have been largely prescribed or reviewed by the Commission. The said fact was called to the attention of the Commission in the present proceeding. In addition to the cases referred to in paragraph V hereof, wherein the Commission approved the general level of the rates on grain and grain products, the Commission had in numerous cases prior to its Report in the present proceeding approved or prescribed specific rates on grain and grain products in various parts of the Western District. The Order of the Commission, in addition to requiring a material reduction in the general level of the rates on said commodities, requires the reduction of many rates theretofore specifically approved or prescribed

by it as reasonable under the standards of the Interstate Commerce Act. The said reductions are required to be made without any finding of any changed conditions and without any recital of facts sufficient to warrant the conclusion that the said rates theretofore approved or prescribed as reasonable had become or would be for the future unreasonable under the standards of the Interstate Commerce Act. Each and all of said rates are required to be reduced by reason of the aforesaid erroneous conception of the duties and powers of the Commission.

(*b*) The present rates on grain and grain products from Southern Idaho to points in Oregon, Washington, California and Arizona, as set forth in Appendix D to the Report were approved and prescribed in *Ogden Grain Exchange* v. *Arizona Eastern RR. Co., et al.*, 126 I. C. C. 255, 128 I. C. C. 490, 132 I. C. C. 46. The said case was decided during the pendency of the present proceedings and was instituted and determined under Section 1 of the Interstate Commerce Act. At the conclusion of its main report therein, (126 I. C. C. 255, 281) the Commission stated:

> "It will be understood that our findings herein are limited to the issue of what are or will be the reasonable maximum rates on this traffic without regard to the provisions of the Hoch-Smith resolution. We shall leave for determination in the pending general investigation the question whether any of these rates are the lowest possible lawful rates compatible with adequate transportation service."

The present rates from points in Utah, Idaho, Montana and Wyoming to points in Colorado, as set forth in Appendix D of the Report, were approved or prescribed as reasonable rates in *Ogden Grain Exchange* v. *Abilene & Southern Ry. Co.*, 122 I. C. C. 691, decided during the pendency of the present proceeding. Said case was in-

stituted and decided under Section 1 of the Interstate Commerce Act. At the conclusion of its report therein, the Commission stated (p. 717):

> "To the extent that different conclusions, in any respect, may follow from the pending general investigation, it is to be understood that the present conclusions are necessarily based upon the record before us. Moreover, it will be understood that our findings, under section 1 herein are limited to the issue of what are or will be the reasonable maximum rates on this traffic without regard to the provisions of the Hoch-Smith resolution. We shall leave for determination in the general investigation the question whether any of these rates are the lowest possible lawful rates compatible with adequate transportation service."

The Order of the Commission in the present proceeding reduces all of the rates approved or prescribed as reasonable in the aforesaid cases, the extent of such reduction being shown in Appendix D to the Report and in the Supplemental Report. Neither the Report nor the Supplemental Report contains any findings of changed conditions or additional facts, or any finding or recital of facts sufficient under the Interstate Commerce Act, to warrant the reduction of said rates, theretofore approved or prescribed by the Commission thereunder. The reductions ordered to be made therein were based on the aforesaid erroneous conception of the duties and powers of the Commission.

(c) It appears from the Report that the principal movement of grain within and from the Western District is through certain cities known as primary markets; that a large part of the grain is shipped to said primary markets, stored in elevators and/or milled thereat, and subsequently reshipped either as grain or grain products; and that reshipping rates (known as "proportional rates") apply both on said traffic and on traffic moving through

said primary markets without such stoppage. The proportional rates, as appears from the Report, are the result of competition between carriers and between the primary markets, and are materially lower than either the existing local rates between the same points or the local rates prescribed as reasonable in the Order.

The Order materially reduces all except two of the proportional rates listed in Appendix D to the Report (38 in number). The proportional rates prescribed by the Commission are on an average approximately 70% of the proportional rates now in effect. Many of the proportional rates, so reduced, have either been hitherto prescribed or approved by the Commission, and those not prescribed or approved have, by reason of competitive conditions, been made in relation to the rates so prescribed. Said proportional rates, whether prescribed or approved by the Commission, are inter-related to each other by reason of competitive conditions.

(*c1*) The present proportional rate of 17.5c applying from both Omaha and Kansas City to Chicago is the result of the application of the percentage increases and decreases, authorized or directed by the Commission to be made in *Increased Rates, supra* and in *Rates on Grain, Grain Products and Hay*, 64 I. C. C. 85, to a theretofore existing proportional rate between said points of 15c. In *Board of Railroad Commissioners of the State of Iowa* v. *Director General*, 63 I. C. C. 405, the Commission found said rate of 15c to have been made as a result of carrier competition and to be on a basis lower than would otherwise have been justified. In its Report in the present proceeding the Commission affirms its previous finding that the said rates are the result of carrier competition.

The present proportional rate of 13.5c from both Omaha and Kansas City to St. Louis has been

made in direct relation to the said proportional rate to Chicago and for the purpose of equalizing the movement of grain and grain products through St. Louis and Chicago respectively.

The Order reduces the said proportional rates as follows: From Omaha and Kansas City to Chicago, from 17.5c to 15c; from Omaha to St. Louis from 13.5c to 13c; from Kansas City to St. Louis from 13.5c to 9c.

(*c2*) The present proportional rate of 24c from Kansas City to Memphis was approved by the Commission in *Board of Trade of Kansas City, Missouri* v. *A. W. Ry. Co.*, 102 I. C. C. 285, decided September 26, 1925. The Order requires the carriers to reduce said rate to 16c and at the same time to make corresponding reductions in the proportional rates from Omaha and St. Louis to Memphis.

(*c3*) The present proportional rate of 23.5c from St. Louis to Little Rock is the result of the application of the percentage increases and decreases authorized or directed to be made in *Increased Rates, supra,* and in *Rates on Grain, Grain Products and Hay,* 64 I. C. C. 85, to a proportional rate of 20c between said points prescribed by the Commission in *Arkansas Manufacturers & Jobbers Association* v. *Director General,* 59 I. C. C. 662. The said rate was prescribed by the Commission in the said case as a just, reasonable and non-prejudicial *minimum* proportional rate between said points, and the order of the Commission therein directed the carriers to advance the proportional rate theretofore in effect. The present proportional rate from Kansas City to Little Rock of 26.5c was approved by the Commission as a reasonable rate under the standards of the Interstate Commerce Act in *Arkansas Jobbers & Manufacturers Associa-*

tion v. *C. R. I. & P. Ry. Co.*, 80 I. C. C. 620, decided June 11, 1923. The Order of the Commission requires the said proportional rates of 23.5c and 26.5c from St. Louis and Kansas City, respectively, to Little Rock, to be reduced to 10c and 16c respectively, and makes corresponding reductions in the proportional rates from Omaha to Little Rock and from Kansas City, Omaha and St. Louis to points farther south, to wit, to Texarkana, Arkansas, to Texas Group 3 and to Louisiana Group 3. In the said two cases the Commission also prescribed just, reasonable and non-prejudicial proportional rates from St. Louis and Kansas City to numerous destinations in the State of Arkansas other than Little Rock. No specific proportional rates from St. Louis, Kansas City or Omaha to said destinations are prescribed in the Order, but the Order requires that the rates between points not specifically named therein shall be made in reasonable relation to the rates specifically prescribed. By reason of the premises the Order requires that the proportional rates from St. Louis, Kansas City and Omaha to said destinations in the State of Arkansas be reduced correspondingly with the reductions specifically required by the Order to be made in the proportional rates from St. Louis, Kansas City and Omaha to Little Rock, Texarkana and other points.

(*c4*) The present proportional rate of 28.5c from St. Louis to New Orleans is the result of applying the percentage reduction required by *Rates on Grain, Grain Products and Hay*, 64 I. C. C. 85, to a proportional rate of 31.5c between said points heretofore established by the Commission in *I. & S. Docket 1303* (known as the Mississippi Valley case), 64 I. C. C. 306, decided in 1921. The said

rate was prescribed for application by the lines operating from St. Louis to New Orleans on the east side of the Mississippi River only, and hence for transportation wholly outside the Western District. Thereafter, in a proceeding entitled *Memphis & Southwestern Investigation,* 142 I. C. C. 139, decided during the pendency of these proceedings, and on April 9, 1928, the Commission, acting under Section 4 of the Interstate Commerce Act, authorized the carriers in the Western District, operating between said points on the west side of the Mississippi River, to establish said proportional rate of 28.5c, and at the same time to charge higher rates at intermediate points. Under the interpretation placed upon said Section 4 by the Commission the said authority was granted and could have been lawfully granted only if the said proportional rate was lower than a reasonable rate, under Section 1 of the Interstate Commerce Act, and only if the higher rates at intermediate points were reasonable. The Order requires the said proportional rate of 28.5c to be reduced to 19c and makes corresponding reductions in the proportional rates from Memphis, Kansas City and Omaha to New Orleans.

(*c5*) The present proportional rate of 13c on wheat from Minneapolis to Chicago was found by the Commission in *Chamber of Commerce of Milwaukee* v. *C. B. & Q. R. R. Co.,* 78 I. C. C. 110, decided March 14, 1923, to be among the lowest rates on said commodity in the country for like distance and to have been made in order to meet the rail-and-lake competition from Minneapolis via Duluth to Milwaukee and Chicago. The Order requires said rate to be reduced from 13c to 12c.

In reducing the said proportional rates and all of them, the Commission was not proceeding under the standards of the Interstate Commerce Act but under the aforesaid erroneous conception of the powers and duties of the Commission.

(*d*) It appears at page 657 of the Report that the Commission in a case entitled *Oklahoma Millers' League* v. *A. & M. R. R.* (Docket 15026) decided June 17, 1927, and reported in 128 I. C. C. 523, prescribed a mileage scale of rates on grain and grain products between Oklahoma and Louisiana; that the said scale was the substantial equivalent of the scale theretofore prescribed by the Commission from Oklahoma to Texas in *Oklahoma Corporation Commission* v. *A. & S. Ry. Co.,* 101 I. C. C. 116, decided July 6, 1925; and that the said scale was later held, in *Rodney Milling Co.* v. *St. L. & S. F. Ry. Co.,* 147 I. C. C 569, decided October 18, 1928, to be reasonable for application from Kansas to Arkansas and southern Missouri. The effect of said decisions was to establish a substantially uniform scale of Commission-prescribed rates for the movement of grain and grain products substantially throughout the Southwest. It appears on the face of the Report that the said scale was established in mathematical relationship to the first-class rates in said territory. Said first-class rates had been prescribed by the Commission in *Consolidated Southwestern Cases,* 123 I. C, C. 203, decided April 5, 1927. The said rates on grain and grain products were prescribed both as reasonable rates under the Interstate Commerce Act and as rates bearing a proper relationship to the rates on other traffic. The Order requires the carriers in the Southwest hereafter to establish and maintain, in lieu of said mileage scale, a lower mileage scale.

The average rates on wheat under the new mileage scale are approximately 85% of the wheat rates theretofore

prescribed as reasonable in said territory and the rates on corn are (with minor exceptions) lower than those previously prescribed for all distances up to 750 miles.

The said rates theretofore prescribed as reasonable were so prescribed in 1927 while the present proceeding was pending and after adoption of the Hoch-Smith Resolution, and the aforesaid decision finding the same to be reasonable for the transportation of grain and grain products from Kansas to Arkansas and Southern Missouri was made after the record in the present proceeding was closed. All said rates were prescribed under the Interstate Commerce Act. The Order, in addition to prescribing said lower mileage scale for application in the Southwest, prescribes interior mileage scales for application in all other parts of the Western District made in relationship to said reduced Southwestern scale. In reducing said scale and in making said other mileage scales in relation thereto the Commission was not proceeding under the standards of the Interstate Commission Act but under the aforesaid misinterpretation of said act and of the Hoch-Smith Resolution.

(*e*) In numerous other cases the Commission has prescribed or approved as reasonable rates which are materially reduced by the order herein. The Report and Order deal with the grain rate structure in the Western District as a whole and the several parts of the Order and the numerous rates prescribed therein are interdependent. In the readjustment required by the Order, the Commission was not proceeding under the Interstate Commerce Act but was proceeding upon its aforesaid erroneous conception of its powers under the Interstate Commerce Act and in disregard of the provisions thereof.

In so proceeding, the Commission proceeded on the erroneous assumption that it was empowered, or directed, to reduce rates on agricultural products by reason of depression in the agricultural industry, if it found the same

to exist, although the existing rates thereon were reasonable and lawful under Section 1 of the Interstate Commerce Act. By reason of the premises the Order of the Commission is beyond its authority to make and is void.

X.

The interpretation placed upon the Hoch-Smith resolution and upon provisions of the Interstate Commerce Act by the Commission, is such, if correct, as to render said resolution and provisions unconstitutional and void because in contravention of the Fifth Amendment to the Constitution of the United States.

XI.

(*a*) It appears at pages 697 and 698 of the Report that the Commission in making its Order took into consideration certain checks and estimates in respect of the revenue effects of the said Order. None of said checks and estimates was of record in the proceedings before the Commission. None of said checks and estimates has ever been called to the attention of the carriers in the Western District, and they have been given no opportunity to cross-examine any witness regarding the basis for such estimates or to introduce evidence in respect thereof.

(*b*) It also appears on pages 698 of the Report that the Commission in making its Order took into consideration supposed increases in revenues granted in certain other cases (not therein named) and that its conclusion that the reductions required would not threaten the maintenance of an adequate system of transportation was based in part thereon. In so doing the Commission erroneously assumed that in the determination of rates on agricultural products, affected by depression, the Commission had been

relieved of the duty imposed by Section 15a to initiate, establish, modify or adjust rates or that out of the aggregate thereof the carriers should earn a fair return upon the value of the property devoted to the public service, and had empowered and directed the Commission in lieu thereof to reduce the rates on said agricultural products, provided, in the opinion of the Commission, such reductions would not threaten the maintenance of an adequate system of transportation. There was no evidence before the Commission in the present proceedings as to the extent of increased revenues, if any, which would result from the action taken by the Commission in other cases. None of the estimates thereof considered by the Commission has ever been called to the attention of the carriers in the Western District, and they have been given no opportunity to cross-examine the witness as to the basis for such estimates or to consider evidence in respect thereof. Nor was there any evidence of record before the Commission of any cases in which increased revenues had been granted or which would result from the action of the Commission. In considering the said supposed increases, the Commission, in addition to proceeding upon an erroneous interpretation of the statute, considered evidence not of record before it.

(*c*) It appears from page 627 of the Report that in considering the financial condition of the carriers the Commission considered the results of operation and the rate of return for the year 1928. No evidence in respect of the net operating income of said year or of the rate of return received therein, or from which the same could be determined was of record in the proceedings before the Commission.

(*d*) In considering matters and things referred to in paragraphs (*a*), (*b*) and (*c*) hereof and each of them, the Commission gave consideration to facts and matters out-

side the record, by reason whereof the Order of the Commission is void and beyond the authority of the Commission to make.

XII.

It also appears on page 698 of the Report that the Commission reached its conclusion "in the realization that a failure of the present revision to afford adequate revenues will prompt further proceedings", and that the Commission concluded that "the full effect upon revenues can not be adequately foretold". It thus appears that the Commission took into consideration as an essential element in making its decision that any error in the decision would probably be cured as the result of an effort of the injured party to institute new proceedings to obtain relief. In taking into consideration its conjecture that the aggrieved party under its decision would be so aggrieved that it would later ask relief, the Commission dealt with property rights upon an admittedly insufficient finding of facts, and its action constitutes an abuse of administrative discretion and renders the Order void, and is in violation of the Fifth Amendment to the Constitution of the United States as a taking of private property without due process of law.

XIII.

(*a*) On or about September 6, 1930, petitioners, by their joint petition duly filed with the Commission, prayed for a rehearing and reconsideration of the Order, a copy of said petition being hereto attached, marked "Exhibit I" and made a part hereof. On or about the said date, separate groups of said petitioners and certain individual carriers, included among said petitioners, duly filed supplemental and additional petitions for rehearing and re-

consideration. All of said petitions were denied November 11, 1930. Said petitions for rehearing and reconsideration alleged that the Order was invalid for the reasons therein set forth, and said joint petition, in addition, alleged the existence of changed conditions since the close of the record on September 22, 1928, by reason whereof the condition of the carriers had become materially worse than as evidenced by said record, and prayed, among other things, for a reopening of the said case for the submission of evidence in respect of such changed conditions.

(*b*) Prior to the denial of said petitions for rehearing, a Committee of the Western Association of Railway Executives, comprising the chief executive officers of the carriers in the Western District, had presented to the Interstate Commerce Commission a statement in writing dated October 25, 1930, showing the serious financial difficulties which confronted said carriers and stating that the adequacy of transportation would be menaced by any reductions in revenue. A copy of said statement in writing is hereto attached, marked "Exhibit J" and made a part hereof. Thereafter, and at the suggestion of the Commission that they state what measures, if any, would be of relief, they submitted a further statement, dated November 26, 1930, (a copy of which is hereto attached, marked "Exhibit K" and made a part hereof), which was in part as follows:

> "Since our original statement was presented, petitions filed by the railroads and others to reopen the proceedings entitled *Grain and Grain Products*, 164 I. C. C. 619, have been denied. We therefore face a further loss in revenue of $20,000,000 a year, which revenue loss we are in no position to meet. A specific suggestion on our part is that, in the light of the facts now present and the adverse change in conditions since the record in this case was closed almost two years ago, the operation of

this order be suspended during the existence of the present emergency and for a period of not less than one year from January 1, 1931. We ask this so we may be relieved of the necessity of coping with this further drastic loss of much needed revenue in the face of the acute situation which confronts us. We cannot hope to recoup this loss of revenue from other traffic prior to the date these reduced grain rates are required to be made effective under your order. The present situation is the result of conditions to which we called your attention in our previous communication, many of which could not have been foreseen either by regulatory authority or by the carriers. It has affected the entire railroad industry, including bondholders, stockholders and employes, as well. We believe our request to suspend the operation of this rate reduction during this emergency or, at least, until some other means of recouping the loss in revenue shall have been provided, accords with sound public policy and, if granted, will be in the public interest."

On or about the twenty-sixth day of January, 1931, upon inquiry by said Committee as to the action taken or to be taken in respect of said request, said Committee was informed by the Commission that, in order for action to be taken thereon, the filing of a formal petition by the carriers would be required.

(*c*) On or about February 18, 1931, petitioners duly filed with the Commission a petition to vacate and set aside, or postpone the effective date of the Order, to rehear and reconsider the same and to reopen the proceedings for the taking of further evidence. A copy of said petition is hereto attached, marked "Exhibit L", and made a part hereof. The said petition, in addition to renewing the grounds for rehearing contained in the petitions for rehearing filed on or about September 6, 1930, brought to the attention of the Commission additional facts which

had arisen since the close of the record on September 22, 1928, and in part since the filing of the previous petitions for rehearing, including the results of operation for the full year 1930, which said changed conditions were alleged adversely to have affected the condition of the carriers and to be material to a consideration of the propriety and legality of the Order theretofore made.

The said petition alleged, in substance, that the record, upon which the Order of the Commission was based, had become stale by reason of the intervening changes which had taken place and was representative of neither the present nor the future situation, and requested the Commission to vacate, or postpone the effective date of the Order, to rehear and reconsider the same, and to reopen the proceedings for the taking of further evidence in respect of such changed conditions.

The petition, among other things, alleged:

(1) That the gross revenues of the carriers in the Western District had declined approximately 15% because of decreases in the volume of traffic handled;

(2) That the carriers in the said District had never since the enactment of the Transportation Act, 1920, received the fair rate of return contemplated thereby; that during each of the six years immediately preceding the filing of the said petition the net railway operating income of the carriers had been greatly below that contemplated and required by the said section; and that in the year 1930 the net railway operating income of said carriers was less by more than $100,000,000 than the average net operating railway income of the five years immediately preceding;

(3) that due to reductions in gross and net revenues, the net railway operating income of the car-

riers in 1930 was not less than $234,838,565 below the amount required to equal 5.75% on a minimum valuation of the property of the carriers and that the carriers' rate of return on true value of their property in 1930 had declined, since the close of the hearing, to not more than 3.1%;

(4) that the traffic handled in January, 1931 had declined 14.06% below that handled in January, 1930, by reason whereof the current net railway operating income and rate of return was even lower than that received in 1930 and would be still further reduced by not less than $20,000,000 if the order of the Commission should become effective;

(5) that the net railway operating income for the year 1930, inadequate as it was, had been accomplished only through a drastic retrenchment program, including sweeping reductions in maintenance, and resulting in increasing unemployment throughout the Western District, the number of employees therein having declined from 637,092 in November, 1929 to 508,664 in November, 1930;

(6) that, since the close of the record, there had been an increased diversion of traffic to other agencies of transportation, to wit, motor buses, motor trucks, water line carriers and pipe lines, all of which adversely affected the ability of the carriers to maintain an adequate net railway operating income;

(7) that traffic in grain and grain products is the only major description of traffic, the volume of which had not declined since the close of the record; that such traffic was moving freely under existing rates and that neither the volume nor freedom of movement would be increased by the required reductions therein, as a result of which the

effect of the order was materially to reduce the revenues of the carriers from the only major classification of traffic, the volume of which had not declined;

(8) that since the close of the record, the aforesaid and other changed conditions had been such as seriously to impair the credit and adversely to affect the marketability of the securities of the carriers in the Western District, to threaten the maintenance of an adequate system of transportation, and to impair the ability of the carriers to provide the same; and

(9) That the conclusion of the Commission, as expressed in its Report, that the reductions required would not threaten the maintenance of an adequate system of transportation, were based upon checks and estimates of the revenue effects of the order and of supposed increases in revenue resulting from action in other cases, which, in addition to being outside the record, were erroneous in that the Commission had under-estimated the losses resulting from the reductions required by the Order in the present proceeding and had over-estimated supposed increases resulting from action taken in other cases and that, in truth and in fact, there were no other cases as a result of which, by reason of the action taken by the Commission therein, any substantial increase in revenues would accrue to the said carriers.

The petition set forth in great detail facts and figures upon which the foregoing statements were based and other facts pertinent to the propriety and validity of the Order, each and all of which the petitioners offered to prove if a rehearing and reconsideration of the Order should be granted.

Each and all of the facts alleged in said petition are true.

(*d*) On the third day of March, 1931, 13 days after the filing of said petition, the Commission entered an order denying the same.

(*e*) The duties conferred and powers imposed upon the Commission by the Interstate Commerce Commission are of a continuing character. At the time of the filing of said petition the Order had not become effective and will not become effective, if restrained or set aside by the action of this Honorable Court. Although, as hereinbefore stated, the effective date of the Order has been from time to time extended by the Commission, it appears from the orders granting such extensions and from the Supplemental Report of the Commission that each and all of said extensions were based solely upon mechanical difficulties, involved in the revision and publication of hundreds of thousands of rates required to be revised thereby, and upon petitions filed by the carriers on that account, and to no extent upon the aforesaid petitions or requests by the carriers for the postponement of the effective date thereof because of the changed conditions aforesaid. Each and all of said petitions and requests were denied by the Commission as aforesaid.

The matters and things set forth in said petitions for rehearing were material to the determination of the propriety and validity of the Order of the Commission requiring said rates to be reduced for the future. The Interstate Commerce Act contemplates that the orders of the Commission, so far as possible, should be responsive to existing and future conditions. The record upon which the said Order is based is, as aforesaid, stale and not representative either of present or future conditions. The matters and things alleged therein, if true, had a material bearing upon the exercise of the powers and duties of

the Commission under the Interstate Commerce Act, and if true, rendered the Order of the Commission, requiring said rates to be reduced for the future, void and beyond the authority of the Commission to make.

The action of the Commission in denying the said petitions for re-hearing and the request of the carriers for a postponement of the effective date of the Order, and by so doing in requiring the rates prescribed therein to become effective in the future without any hearing or consideration of the changed conditions therein set forth, was taken in disregard and in violation of the duties imposed upon it by the Interstate Commerce Act, constituted an abuse of its administrative discretion and was in excess of the authority conferred upon it by law, denied to the carriers a hearing or opportunity to be heard, constituting a denial of due process of law, in violation of the Fifth Amendment to the Constitution of the United States, by reason whereof the Order requiring the same to become effective June 1, 1931 is void.

XIV.

In entering the Order and in denying the said petitions and requests of the carriers the Commission acted in so arbitrary and unreasonable a manner as to render its Order, although within the form of its delegated powers, void.

XV.

The Order, as amended, requires the carriers to put the prescribed rates into effect on or before June 1, 1931, upon not less than fifteen days filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act. Unless the enforcement, operation and execution of the Order is restrained and suspended during the pendency of this proceeding, irreparable injury will ensue

to petitioners, in that they will be compelled, under the severe penalties prescribed by the Interstate Commerce Act, to publish, collect, and charge the rates fixed by the Order, at a loss in the revenues to the carriers in the Western District in a sum not less than $20,000,000 annually.

WHEREFORE, petitioners pray:

(*a*) That a subpoena or subpoenas in chancery issue out of and under the seal of this Honorable Court, directed to the defendants, as required by law, and that due and proper service of such process and of this petition be forthwith made by filing a copy thereof in the office of the Secretary of the Commission, and another copy in the Department of Justice, as in said District Court Jurisdiction Act provided, and that thereby the defendants and each of them be required, on or before a date to be specified in such subpoena or notice, to appear herein and answer this petition, but not under oath, answer under oath being hereby expressly waived.

(*b*) That a temporary or interlocutory injunction be entered herein, restraining, enjoining and suspending, until the further order of this Court, the effect and enforcement of said Order of the Commission.

(*c*) That pending a hearing upon the aforesaid application for a temporary or interlocutory injunction a preliminary restraining order be issued in terms restraining, enjoining and suspending the enforcement of said Order of the Commission until said application for a temporary or interlocutory injunction shall have been heard and determined.

(*d*) That after final hearing this Court adjudge, order and decree that said Order of the

Commission is and has at all times been beyond the lawful authority of the Commission, and wholly void, and that said Order be perpetually set aside, suspended and annulled, and the enforcement thereof perpetually enjoined.

(e) That petitioners, and each of them, may have such other and further relief in the premises as to equity and justice may appertain and as may be deemed by this Honorable Court to be adequate and proper under the circumstances.

FREDERICK H. WOOD,
WALTER MCFARLAND,
ELMER A. SMITH,
P. F. GAULT,
DOUGLAS F. SMITH,
H. H. LARIMORE,
J. N. DAVIS,
A. B. MASON,
R. J. HAGMAN,
M. L. COUNTRYMAN, JR.,
R. S. OUTLAW,
LESLIE CRAVEN,
WM. D. WHITNEY,
A. B. ENOCH,
Solicitors for Petitioners,

Room 1025 La Salle Street Station,
Chicago, Illinois.

W. F. DICKINSON,
O. W. DYNES,
R. V. FLETCHER,
E. E. MCINNIS,
BRUCE SCOTT,
Of Counsel.

..... }
..... } ss.:

....., being first duly sworn, deposes and says that he is an officer, to wit, the..... ..... of ....., one of the petitioners in the above-entitled cause; that he is authorized to sign and verify the foregoing petition on behalf of said petitioner; that he has read the foregoing petition and knows the contents thereof; and that the facts alleged therein are true and correct, except those alleged to be on knowledge and belief and, as to those, he believes it to be true.

.....

Subscribed and sworn to before me this..... day of....., 1931.

.....
Notary Public.

LIST OF EXHIBITS.

Exhibit A—Order of Interstate Commerce Commission instituting Rate Structures Investigation, Docket No. 17,000, dated March 12, 1925.

Exhibit B—Notice to the Public issued by the Commission in connection with the institution of Rate Structures Investigation, Docket No. 17,000, dated March 12, 1925.

Exhibit C—Notice by the Commission of consolidation of *Grain and Grain Products Within the Western District and For Export*, Docket No. 17,000, Part 7, with certain other pending cases, for hearing, dated December 30, 1926.

Exhibit D—Notice by the Commission of assignment thereof for hearing, dated March 28, 1927.

Exhibit E—Report and order of the Commission therein, 164 I. C. C. 619.

Exhibit F—Supplemental report and order of the Commission therein, dated April 10, 1931.

Exhibit G—Report and order of the Commission in *Kansas Public Utilities Com.* v. *A. T. S. F. Ry. Co.*, 83 I. C. C. 105.

Exhibit H—Report and order of the Commission in *Rates and Charges on Grain and Grain Products*, 91 I. C. C. 105.

Exhibit I—Petition of carriers in Western District for rehearing, filed September 6, 1930.

Exhibit J—Statement submitted to the Commission by the Western Association of Railway Executives, dated November 6, 1930.

Exhibit K—Letter addressed to the Commission by a Committee of the Western Association of Railway Executives, dated November 26, 1930.

Exhibit L—Petition of carriers in Western District for rehearing, filed February 18, 1931.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 12th day of March, A. D. 1925

No. 17000

RATE STRUCTURE INVESTIGATION

IN THE MATTER OF ADJUSTMENTS IN THE RATE STRUCTURE OF COMMON CARRIERS SUBJECT TO THE INTERSTATE COMMERCE ACT, AND THE FIXING OF RATES AND CHARGES

It appearing, That by joint resolution of the Congress approved January 30, 1925, the commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, as follows:

[PUBLIC RESOLUTION—No. 46—68TH CONGRESS]

[S. J. Res. 107]

Joint Resolution Directing the Interstate Commerce Commission to take action relative to adjustments in the rate structure of common carriers subject to the Interstate Commerce Act, and the fixing of rates and charges.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Com-

mission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.

That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make, in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution the commission shall give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation. In the progress of such investigation the commission shall, from time to time, and as expeditiously as possible, make such decisions and orders as it may find to be necessary or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates. Such investigation shall be conducted with due regard to other investigations or proceedings affecting rate adjustments which may be pending before the commission.

In view of the existing depression in agriculture, the commission is hereby directed to effect with the least

practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service: *Provided*, That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the commission involving rates on products of agriculture, and that such cases shall be decided in accordance with this resolution.

Approved, January 30, 1925.

It is ordered, That an investigation of the rate structure of common carriers subject to the interstate commerce act be, and it is hereby, instituted by the commission in order to:

(*a*) Determine to what extent and in what manner, if any, rates, fares, and charges, and all classifications, regulations, and practices relating thereto, hereinafter for brevity collectively termed rates, of such common carriers for or in respect of the transportation or transmission by such carriers in interstate or foreign commerce of the various classes and kinds of commodities and the various classes of traffic, including freight, passenger, mail, and express, or any other, similar or dissimilar, may be unjust, unreasonable, unjustly discriminatory, unduly preferential, or otherwise in violation of any provision of law, including the joint resolution aforesaid.

(*b*) Determine to what extent and in what manner, if any, the rates, as above defined, of such common carriers cause undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate

commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.

(c) Make, in accordance with law, such changes, adjustments, and redistribution of rates, as above defined, as may be found necessary to correct any defects so found to exist, and to determine to what extent, if any, and upon what classes and kinds of commodities or classes of traffic, if any, compensating increases or other changes in rates, as above defined, may and shall lawfully be required or authorized by the commission in order to offset or partially offset such reductions or other changes in rates, as above defined, on other classes or kinds of commodities or classes of traffic, giving due regard, among other factors, to—

(1) The conditions which prevail in the several industries of the country, in so far as it is legally possible to do so, to the end that commodities may freely move;

(2) The general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years;

(3) A natural and proper development of the country as a whole;

(4) The maintenance of an adequate system of transportation;

(5) Any other requirement of law laid upon the commission in respect of the initiation, modification, establishment, or adjustment of rates, as above defined.

(d) Make in the progress of the investigation such decisions and orders as the commission may find neces-

sary or appropriate upon the record then made in order to place the rates upon designated classes or kinds of commodities or classes of traffic upon a just and reasonable basis with relation to other rates.

(*e*) Effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by the existing depression declared in said joint resolution, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service.

It is further ordered, That all common carriers subject to the interstate commerce act be, and they are hereby, made respondents to this proceeding; that this order be served upon each of said respondents; that the several States of the United States be notified of this proceeding by sending copies of this order by registered mail to the governor of each State, as well as to the tribunal thereof, if any, having regulatory jurisdiction over such common carriers; that copies of this order be sent to the heads of the executive departments of the United States; and that notice of this proceeding be given to the public by depositing a copy of this order in the office of the secretary of the commission, at Washington, D. C.

And it is further ordered, That this proceeding be assigned for hearing at such times and places as the commission may hereafter direct.

By the commission.

GEORGE B. MCGINTY,
Secretary.

[SEAL.]

INTERSTATE COMMERCE COMMISSION

No. 17000—Rate Structure Investigation

In the Matter of Adjustments of the Rate Structure of Common Carriers Subject to the Interstate Commerce Act, and the Fixing of Rates and Charges

March 12, 1925.

To the Public:

As directed by a joint resolution of the Congress, S. J. Res. 107, the so-called Hoch-Smith resolution, approved January 30, 1925, the Interstate Commerce Commission has to-day instituted a general investigation upon its own motion, by order, docketed and entitled as above. Therein are brought in question all the rates, fares, and charges, and all classifications, regulations, and practices relating thereto, of common carriers subject to the interstate commerce act for the transportation or transmission in interstate or foreign commerce of the various classes and kinds of commodities and of the various classes of traffic, including freight, passenger, mail, and express; and also the relationship between the interstate and intrastate rates, fares, and charges. A copy of this order is attached and the joint resolution is set out therein.

Briefly summarized, the purpose of this investigation is to comply with the joint resolution in order to determine the extent and manner in which the rate structure of common carriers subject to the interstate commerce

act is in any respect unlawful, and to make in accordance with law such changes, adjustments, and redistribution in that rate structure as may be necessary to correct any defects found to exist.

In discharge of this duty the commission will not enter at once upon extensive hearings. It intends to conduct the investigation in a manner conducive to full and orderly development of material facts and with as little delay and expense to shippers, carriers, and the Government, and as little disturbing effect upon production, distribution, and the free flow of commerce, as may be found practicable. Necessary or appropriate decisions and orders may be made in the progress of the investigation. The commission is required to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by the existing depression declared in said joint resolution, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service.

The joint resolution authorizes and directs the commission to make a thorough investigation of the rate structure of "common carriers subject to the interstate commerce act." Accordingly all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such forms of transportation or transmission as well as those engaged in the transportation of persons or property by rail or by water subject to the act, have been made respondents in this proceeding. But it is not the inten-

tion of the commission to proceed now, without further notice, to consider the rate structure of carriers other than those engaged in the transportation of persons or property, including mail and express matter, by rail or by water subject to the act, as a part of the present proceeding of investigation.

In the conduct of this investigation the commission will avail itself, as far as it can, of the assistance and cooperation of State authorities possessing rate-making powers, and invokes the cordial cooperation and assistance of all shippers and carriers.

Changes, if any, in the rate structure of the country, under the resolution, will be made after giving due consideration, among other factors, to:

(1) The conditions which prevail in the several industries of the country, in so far as it is legally possible to do so, to the end that commodities may freely move, consideration of which to such extent is declared by Congress to be the true policy in rate making to be pursued by the commission.

(2) The general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years.

(3) A natural and proper development of the country as a whole.

(4) The maintenance of an adequate system of transportation.

(5) Other requirements of law, whether statutory or found in the Constitution, which control the commission in respect of the initiation, modification, establishment, or adjustment of such rates, fares, charges, and all classifications, regulations, and practices relating thereto.

Attention is directed to the proviso in the last paragraph of the resolution:

> *Provided,* That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the commission involving rates on products of agriculture, and that such cases shall be decided in accordance with this resolution.

The provisions of the resolution are now a part of the law which the commission administers, and are therefore to be applied in every case which may fall within the terms of the resolution, or be affected thereby, whether adversely or beneficially.

The commission expects these requirements of the law to be considered by all parties in proceedings now pending before it, so that any material and relevant facts necessary may be made of record in cases yet to be heard. As to cases already heard, whatever their status short of final decision by the commission, any party deeming the record insufficient in this regard should promptly call the attention of the commission and adverse parties to the deficiency, and the general nature of the facts tendered to supply the omission. This should be done in the manner in which other procedural motions are made and served in pending cases.

If in the light of the resolution parties to cases heretofore decided consider that such cases should be reopened for the purpose of presenting matters comprehended by the resolution, application for such reopening should be made in the manner prescribed by Rule XV of the commission's Rules of Practice, and should state

briefly the nature and purpose of the evidence to be introduced as required by that rule.

In order that the commission may as soon as possible carry out the mandates of the joint resolution as above summarized, and in aid of such purposes, the public generally, including both shippers and carriers, whether as individuals or in organizations, and the public authorities, State and Federal, (1) may file with the commission any desired brief or statement as to the intent of the joint resolution, the construction thereof, and the procedure to be pursued in giving effect thereto; and (2) may bring to the attention of the commission any appropriate statement of the facts, verified by affidavit, deemed to bring any classes of traffic, or any class or kind of commodities, or any general or special schedule of rates, fares, and charges, or other matters embraced in the investigation, within the provisions of the resolution. In the event it is claimed that any of the various classes and kinds of commodities and of the various classes of traffic is subjected to undue burden, any traffic or commodities receiving undue advantage or on which compensatory increases could be placed if found necessary should be indicated as clearly as possible. To facilitate the study and examination of the informal representations so to be made, it is desired that such memoranda shall be prepared and printed in the same form as briefs before the commission although legible typewritten or mimeographed memoranda will be received, and that at least 25 copies shall be furnished to the commission for its use, as soon as possible, and not later than May 15, 1925. A file of such memoranda will be open to public inspection in the

office of the secretary of the commission. Answers to any such memoranda may be made by any interested person in like manner and be lodged with the commission not later than June 15, 1925. Such memoranda can not, under the law, take the place of evidence upon the hearing, or be given weight in the final consideration and disposition by the commission of the matters involved. They are desired for the aid and guidance of the commission in shaping its procedure.

Meantime, the commission will constitute a committee of its own membership, which, with the assistance of competent experts, and of representatives of the State commissions, will study known or discoverable situations. Upon consideration of the results of such study and of the representations made by memoranda as contemplated in the last preceding paragraph of this notice, and of such applications as may be made for rehearings or further hearings in pending or decided cases, the commission will decide and announce the order of its further procedure in the pending investigation.

All correspondence in this proceeding should be addressed to the secretary of the Interstate Commerce Commission, Washington, D. C., and should refer to Docket No. 17000.

By the commission.

GEORGE B. MCGINTY, *Secretary.*

INTERSTATE COMMERCE COMMISSION

WASHINGTON

December 30, 1926.

NOTICE

GRAIN AND GRAIN PRODUCTS WITHIN THE WESTERN DISTRICT AND FOR EXPORT. No. 17000.

Rate Structure Investigation
Part 7, Grain and Grain Products.

No. 16294—State of Colorado and Public Utilities Commission of the State of Colorado v. M. P. R. R. Co., et al.

No. 17477—St. Joseph Grain Exchange et al. v. A. & S. Ry. Co., et al.

No. 17976—Omaha Grain Exchange et al. v. A. T. & S. F. Ry. Co., et al.

No. 17992—Southern Kansas Millers Traffic Club, et al. v. A. & S. Ry. Co., et al.

No. 17992 (Sub-No. 1)—Salina Chamber of Commerce et al. v. A. & S. Ry. Co., et al.

No. 18203—American Maid Flour Mills v. A. & S. Ry. Co,. et al.

No. 18359—Atchison Board of Trade et al. v. A. & S. Ry. Co., et al.

No. 18359 (Sub-No. 1)—Sioux City Grain Exchange v. A. & S. Ry. Co., et al.

No. 18669—Southwestern Millers League v. A. T. & S. F. Ry. Co., et al.

No. 18669 (Sub-No. 1)—Globe Grain & Milling Co. v. A. T. & S. F. Ry. Co., et al.

No. 18782—New Orleans Joint Traffic Bureau v. A. & S. Ry. Co., et al.

No. 18860—Des Moines Elevator & Grain Co., et al. v. C., B. & Q. R. R. Co., et al.

No. 18900—Des Moines Board of Trade et al. v. K. C., C. C. & S. J. Ry. Co., et al.

There are pending before the Commission certain formal complaints assailing the rates on grain and grain products between points within the western and Mountain Pacific groups as defined in *Increased Rates, 1920,* 58 I. C. C. 220, hereinafter referred to as the western district. There has been filed with the Commission a request of the Corporation Commission of Oklahoma that there be instituted a general investigation of rates on grain and grain products between points in Texas, Oklahoma, Kansas, Missouri, Nebraska and Iowa, including the intrastate rates within those states. There has also been filed an application of various carriers seeking an investigation of the rates on grain and grain products between points in the states of Oklahoma, Texas, New Mexico, Arkansas, Louisiana, Kansas and Missouri, including the rate between points within each of those

states. In addition there is pending the general investigation instituted pursuant to the so-called Hoch-Smith Resolution, No. 17000, Rate Structure Investigation, which includes, among others, all of the rates embraced by the proceedings hereinbefore referred to.

The Commission has concluded to assign for hearing with the above-entitled complaints No. 17000 in so far as it covers the rates on grain and grain products between points within the western district and the State of Illinois (including both banks of rivers on the boundary of the territory just described); rates on grain and grain products from the western district and the State of Illinois, when for export through any ports of the United States, including points on the Rio Grande River; and ex-lake rates on grain and grain products when for export. This branch of the general investigation is designated No. 17000, Part 7.

In order to perfect plans for the preparation and presentation of data with a view to avoiding duplication, a preliminary conference will be held at the Kansas City Athletic Club, Kansas City, Mo., January 20, 1927, at 10: o'clock A. M., central standard time, by representatives of the Commission with representatives of state commissions, shippers and carriers.

The Times and places for hearing will be announced later.

A Proposed report will be issued.

Respectfully,

GEORGE B. MCGINTY

INTERSTATE COMMERCE COMMISSION

WASHINGTON

March 28, 1927.

NOTICE

GRAIN AND GRAIN PRODUCTS WITHIN THE WESTERN DISTRICT AND FOR EXPORT. No. 17000.

Rate Structure Investigation

Part 7, Grain and Grain Products.

No. 16294—State of Colorado and Public Utilities Commission of the State of Colorado v. Missouri Pacific Railway Company et al.

No. 17477—St. Joseph Grain Exchange et al. v. Abilene & Southern Railway Company et al.

No. 17992—The Southern Kansas Millers Traffic Club et al. v. Abilene & Southern Railway Company et al.

No. 17992 (Sub-No. 1)—The Salina Chamber of Commerce et al. v. Abilene & Southern Railway Company et al.

No. 18203—American Maid Flour Mills et al. v. Abilene & Southern Railway Company et al.

No. 19103—Merchants Exchange of St. Louis v. Abilene & Southern Railway Company et al.

No. 19279—The Board of Trade of Cairo, Illinois v. Arkansas & Louisiana Missouri Railway Company et al.

No. 18359—Atchison Board of Trade et al. v. Abilene & Southern Railway Company et al.

No. 18359 (Sub-No. 1)—Sioux City Grain Exchange v. Abilene & Southern Railway Company et al.

No. 18669—Southwestern Millers League v. The Atchison, Topeka & Santa Fe Railway Company et al.

No. 18669 (Sub-No. 1)—Globe Grain & Milling Co. v. The Atchison, Topeka & Santa Fe Railway Company et al.

No. 18782—New Orleans Joint Traffic Bureau v. Abilene & Southern Railway Company et al.

No. 18860—Des Moines Elevator & Grain Company et al. v. Chicago, Burlington & Quincy Railroad Company et al.

No. 18900—Des Moines Board of Trade et al. v. Kansas City, Clay County and St. Joseph Railway Company et al.

Of the complaints listed above all but numbers 19103 and 19279, which were subsequently filed, were pending at the time of the institution of this inquiry.* All of these complaints will be heard in connection therewith at such convenient times and places as may be agreed upon. These proceedings are assigned for hearing before Com-

*No. 17976 Omaha Grain Exchange et al. v. Atchison Topeka & Santa Fe Railway Company et al. also pending, was subsequently dismissed.

missioner Meyer and Examiners Mackley and Hall at 10.00 A. M. May 9th, 1927, at the Adolphus Hotel, Dallas, Tex. Further assignments will be announced at the conclusion of the Dallas hearing.

The carriers will be heard first at Dallas. There will be no recess between the taking of testimony of the respective parties, or between the direct and cross examination of each party. The testimony concerning the intraterritorial adjustment in the southwest, that is, Oklahoma, Arkansas, Texas, eastern New Mexico, Louisiana west of the Mississippi River, and Mississippi River crossings, Memphis to New Orleans, inclusive, will be completed at Dallas. The interritorial adjustment between southwestern territory, on the one hand, and western trunk line territory and other points in the western district, on the other, may be heard at Dallas or Kansas City, as the parties may prefer.

The previous notice indicates that the present inquiry covers "the rates on grain and grain products between points within the western district and the State of Illinois (including both banks of rivers on the boundary of the territory just described); rates on grain and grain products from the western district and the State of Illinois, when for export through any ports of the United States, including points on the Rio Grande River; and ex-lake rates on grain and grain products when for export." The petitions of the carriers for the exclusion of western trunk line and Illinois territories, including Illinois, southern Wisconsin and west-bank Mississippi River points, from the scope of the inquiry have been denied.

The issues arise under the Hoch-Smith resolution as well as under the interstate commerce act, and include

the reasonableness of the rates on grain and grain products *per se* and in their relation to the rates on other traffic; the relation of markets; the relation between the rates on wheat and on coarse grains; the relation between the rates on grain and on grain products; and a general review of the rates, regulations and practices, including transit, affecting grain and grain products.

The terms grain and grain products, as used in the more important tariffs applicable in the various rate territories of the western district, include the commodities listed in the appendix. Important questions are whether these descriptions are too broad and whether the rates on grain products should be as low as the rates on grain from which the products are made.

In so far as practicable the respective parties should furnish to the commission, to the state commissions, and to the various shippers' and carriers' committees designated at the Kansas City conference on January 20th, not less than fifteen days prior to the hearing at which they are to be introduced, sets of exhibits to be offered at that hearing. Copies of exhibits to be introduced at the Dallas hearing should be sent to Messrs. Clyde M. Reed, 1012 Baltimore Ave., Kansas City, Mo., W. R. Scott, Board of Trade, Kansas City, Mo., H. G. Taylor, State House, Lincoln, Nebr., and E. B. Enoch, La Salle Street Station, Chicago, Ill., chairman of the committees for the southwestern shippers, the western terminal grain markets, the state commissions, and the southwestern carriers, respectively.

If more than one person enters an appearance for a given interest, or group of interests, only one of such

persons should be selected to conduct the examination of witnesses.

Every effort should be made by all parties to condense their evidence into the smallest possible compass. Oral explanations of exhibits which duplicate at length what is shown on the face of the exhibit should be avoided. Discussion of past decisions of the commission should ordinarily be reserved for brief and argument. Evidence which is merely cumulative should be avoided, and cross-examination should be directed to the development of the facts. Copies of exhibits should be available for all parties entering appearance, and this will necessitate a generous supply.

No cases already decided have been reopened. This is not to be construed as indicating that conclusions different from those reached in such cases may not be determined upon in the pending proceeding.

The record in *Grain and Grain Products*, 122 I. C. C. 235, will be considered a part of the record in No. 17,000, part 7.

A proposed report will be issued.

GEORGE B. MCGINTY,
Secretary.

APPENDIX.

Barley,
Barley, cracked
Barley, flaked
Barley, pearled
Barley, roasted
Barley, rolled
Barley—Oats Mixture
Beans:
  Castor
  Mesquite
  Soy or Soya
  Velvet
Bran:
  Corn
  Rice
  Wheat
Buckwheat
Burrs, cotton boll
Cake:
  Copra
  Cottonseed
  Oil
  Palm Kernel
  Peanut
  Sesame Seed
  Soya Bean
  Sun Flower Seed
  Velvet Bean
Cereal Food Preparations, not otherwise indexed by name in current western classification (cracked, ground, granulated, hulled or rolled cereals for human consumption, cooked or uncooked)
Cerealing
Chaff, barley
Chops:
  Barley
  Corn
  Feterita
  Kaffir Corn
  Milo Maize
  Oat
  Sorghum Head or Sorghum Grain Chops, made from Sorghum Grain in the head,
  Wheat
Clippings, oat
Corn,
Corn, cracked
Corn, crushed
Corn, ground
Corn, Cobs, ground
Cow Peas
Durra (Jerusalem Corn)
Dust:
  Grain
  Elevator
Emmer
Farina
Farinose
Feed:
  Alfalfa
  Animal, Poultry or Pigeon, prepared, (not condimental nor medicated)
  Barley, ground
  Barley Hay Feed
  Bean Straw Feed
  Buckwheat (Bran and Middlings)
  Clover or Sorghum
  Corn, ground
  Gluten
  Gluten Meal
  Grain, not otherwise indexed by name in current western classification
  Hominy
  Oat
  Rye, ground
  Straw By-Product
  Wheat, ground
  Yucca, ground
Feterita
Flakes:
  Brewers
  Corn
  Cottonseed Hull
  Hominy
  Oat
Flaxseed
Flour:
  Buckwheat
  Corn
  Malt
  Mixed Grain

Rye
Sorghum
Spelt or Spelz

Flour manufactured from Beans, Potatoes or Wheat or Flour manufactured from a mixture of any two or more of such articles or Flour manufactured from any one or more of such articles with one or more of the following articles:

Barley, Feterita, Kaffir Corn, Milo Maize or Oats, Grain Flour not otherwise indexed by name, or blends of Grain Flours with cereal Flours, not including Fruit or Vegetable Flour.

Flour manufactured from Barley, Feterita, Kaffir Corn, Milo Maize or Oats, or flour manufactured from a mixture of any two or more of such articles.

Germs, corn

Grain, brewers' (by-product of barley).

Grain, brewers' dried

Grain, Sorghum (Milo Maize, Kaffir Corn, Hegari or Higera, Dorso or Feterita, Shalla).

Grain, spent (dried or wet)

Grits (Grain or Cereal)

Grits, brewers' (including Brewers' Refined Grits)

Groats, oat

Hominy

Hominy, pearl

Hulls:
Barley
Buckwheat
Corn
Cottonseed, ground or unground
Cotton Boll
Oat
Peanut, ground
Rice

Kaffir Corn

Kaoliang

Maizea

Malt

Malt, flaked

Mazam

Meal:
Alfalfa
Barley
Bean Straw
Bran
Brewers
Cactus, ground
Copra
Corn
Corn Cob
Corn Germ
Corn Oil Cake
Cottonseed
Feterita
Gluten
Hominy
Kaffir Corn
Linseed
Mesquite
Milo Maize
Oat
Oil Cake
Palm Kernel
Peanut
Rice, Mixture of Rice Bran and Rice Polish
Sesame Seed
Sorghum
Sorghum Pulp
Soya Bean
Sugar Beet
Sun Flower Seed
Velvet Bean

Middlings

Millstuffs

Milo Maize

Needles, barley

Offal, oat

Oats

Oats, cracked

Oats, ground

Oats, mill (containing more than 30 per cent of wheat)

Oats and Barley blended

Pulp, dried beet

Pummies, ground or unground

Refuse, brewers'

Refuse, flour or mill

Refuse, malters'

Rice Polish

Rye

Rye, cracked

Rye, crushed

Rye, rolled
Screenings:
  Bean
  Grain
  Paddy Rice
  Pea
Skimmings, Barley or Grain (Malt House)
Skimmings, Rye
Seed:
  Broom Corn
  Cane
  Flax
  Hemp
  Hungarian
  Melilotus
  Millet
  Sorghum
  Sudan Grass
  Sun Flower
  Vetch
  Wild Mustard
Shipstuffs
Shorts
Spelt or Spelz
Sprouts:
  Barley
  Rye
  Malt
Wheat, whole
Wheat, cracked
Wheat, crushed
Wheat, flaked
Wheat, granulated
Wheat, Pearl
Wheat, rolled

16734

INTERSTATE COMMERCE COMMISSION

No. 17000[1]

RATE STRUCTURE INVESTIGATION, PART VII

GRAIN AND GRAIN PRODUCTS WITHIN WESTERN DISTRICT AND FOR EXPORT

Submitted July 1, 1929. Decided July 1, 1930.

1. Rates and practices affecting the transportation of grain and grain products throughout the western district, from that district to all ports of export, and from Lake Erie ports to Atlantic ports (as part of a lake-and-rail transportation) reviewed under the interstate commerce act and the Hoch-Smith resolution, and a general readjustment required.
2. Dual system of proportional rates and transit balances outbound from primary markets results in undue preference of shippers under the transit balances and undue prejudice to shippers under the higher proportional rates. Rates through primary markets required to be made exclusively on the rate-break basis of flat rates into the markets and proportional rates beyond, and overhead through rates less than the market combinations required to be canceled.
3. Reasonable through rates prescribed and, when made through the primary markets from which there are proportional rates, broken back into combinations of flat rates into the primary markets and proportional rates beyond.
4. Relation of proportional rates from Omaha, Kansas City, and St. Louis to Memphis and New Orleans, and from Kansas City, Omaha, and Sioux City to Minneapolis and Duluth, substantially revised.
5. Requests of Wichita, Kans., and Grand Forks, N. Dak., for the prescription of outbound proportional rates denied.
6. Rates on coarse grains are now the same as on wheat west of the Rocky Mountains and in Illinois, and 90 per cent of the rates on wheat in the remainder of the western district. One rate prescribed for application on both wheat and coarse grains throughout the entire western district and in Illinois.
7. Rates on grain products, including flour, are higher than on grain from which the products are made in some of the territory west of the Rocky Mountains, and on some transcontinental shipments to the Pacific coast and are the same as on the grain from which the products are made throughout the remainder of the western district. One rate prescribed for application on grain and grain products throughout the entire district.
8. Bran, shorts, and middlings move out of transit points on the transit balances of through rates on wheat in some instances and on the transit balances of through rates on coarse grains in others. The one basis

[1] This proceeding also embraces 58 formal complaint and suspension proceedings (also subnumbers of some of the complaints), as shown in the statement of issues in Appendix A.

herein prescribed for both wheat and coarse grains will correct existing inequalities in this respect.

9. Mixed feeds containing articles other than the direct products of grain are not entitled to move out of primary markets at proportional rates, or out of transit points at the transit balances of through rates, applicable on grain and grain products.
10. Rates on flaxseed prescribed on basis of 112 per cent of the contemporaneous rates on wheat.
11. Bases of rates on farm seeds revised.
12. Transit stops without separate charge limited to two for milling or other treatment plus one for inspection, additional stops for other than inspection to be paid for at the rate of 2 cents per hundred pounds for each stop.
13. Transit is included in the line-haul rate in all parts of the western district except in some parts of the Northwest. The rates prescribed herein will include transit in the line-haul rate in all parts of the western district.
14. Transit tariffs should be thoroughly overhauled and present grants of transit, out-of-line, and back hauls beyond the point of reasonable competitive necessity eliminated.
15. Transit regulations should be published in transit circulars separate from the tariffs of rates in connection with which the regulations are to be applied.
16. Storage in transit of grain products not still in the process of manufacture should be discontinued.
17. So-called unit rule for mixed-carload shipments found to be unlawful.
18. Request of Minneapolis for transit under the rate to Duluth from North Dakota and Montana, from which the rates to Minneapolis and Duluth are the same, based on the location of Minneapolis directly intermediate to Duluth on the route of the Chicago, Milwaukee, St. Paul & Pacific, denied, and the combination of flat rates to Minneapolis and the proportional rate beyond found to be the proper basis of charge under the rate-break system of making rates through primary markets herein prescribed.
19. Previous finding that the rates to Portland, Oreg., should be 10 per cent lower than to Puget Sound ports from points south of the Snake River in Washington and Oregon affirmed.
20. Readjustments required in numerous specific situations presented upon this record and by formal complaints and investigation and suspension proceedings consolidated therewith.
21. One basis for both export and domestic shipments prescribed for application to Texas Gulf ports and north Pacific coast ports.
22. Export differentials to Galveston under New Orleans from designated areas in Texas, Oklahoma, and Kansas prescribed.
23. Relation of export rates from St. Louis, Chicago, and Missouri River markets to New Orleans and Baltimore revised.

Clay S. Henderson, *Brooks Hays*, and *A. D. Beals* for Arkansas Railroad Commission; *William L. Boatright*, *S. E. Naugle*, *Ralph L. Carr*, and *T. S. Wood* for State of Colorado; *J. M. Lampert*, and *Samuel L. Newton* for Public Utilities Commission of Idaho; *Oppenheim & Lampert* for State of Idaho, ex rel. Public Utilities Commission; *P. H. Moynihan* and *H. M. Slater* for Illinois Commerce Com-

mission; *J. H. Henderson*, *Neil Garrett*, *C. B. Ellis*, *Walter Condran*, and *W. F. Parsons* for State of Iowa; *John M. Kinkel*, *C. B. Randall*, *C. J. Putt*, *M. J. Healey*, *W. J. Scott*, *A. A. Brown*, *E. H. Hogueland*, *A. M. Corp*, and *J. N. Atkinson* for Public Service Commission of State of Kansas; *Francis Williams* for Public Service Commission of Louisiana; *G. A. Youngquist*, *E. C. Carman*, and *John F. Bonner* for State of Minnesota; *O. P. B. Jacobson*, *Frank W. Matson*, *L. R. Bitney*, and *C. J. Lavrisch* for Minnesota Railroad and Warehouse Commission; *D. D. McDonald* and *V. E. Smart* for Public Service Commission of Missouri; *Daniel Boyle*, *Francis A. Silver*, *Lee Dennis*, *H. G. Schaefer*, and *E. G. Toomey*, for Board of Railroad Commissioners of State of Montana; *Hugh LaMaster* for State of Nebraska; *U. G. Powell* for Nebraska State Railway Commission; *John F. Shaughnessy* and Frank B. Warren for Public Service Commission of Nevada; *Max Fernandez* and *Harry S. Bowman* for State Corporation Commission of New Mexico; *George F. Shafer* and *S. B. Houck* for State of North Dakota; *T. C. Madden*, *James A. Little*, and *E. M. Hendricks* for Board of Railroad Commissioners of North Dakota; *Paul A. Walker* and *C. B. Bee* for Corporation Commission of Oklahoma; *Wm. P. Ellis* and *J. O. Bailey* for Public Service Commission of Oregon; *D. L. Kelley*, *Raymond L. Dillman*, and *H. A. Hanson* for State of South Dakota; *Ernest May* for State of Texas; *H. C. Brodie* for State of Washington; *Herman L. Ekern* and *C. E. Schreiber* for Railroad Commisssion of Wisconsin; *David J. Howell*, *W. O. Wilson*, and *James A. Greenwood*, for State of Wyoming; and *John E. Benton* for National Association of Railroad and Utilities Commissioners.

M. H. Love and *H. W. Prickett* for Ogden Grain Exchange; *G. H. Work* for Colorado Milling & Elevator Company; *R. S. Orr* for Montana Flour Mills Company, Montana Elevator Company, Judith Basin Mills, Incorporated, Cascade Mill & Elevator Company, State Elevator Company, and Judith Milling Company; *L. F. Nichols* for Royal Milling Company, Rocky Mountain Elevator Company, and Northwestern Grain Dealers Association of Montana; *W. T. McArthur* for Southern Kansas Millers' Club; *H. D. Driscoll* for Oklahoma Millers' Association; *S. J. Cole* for Board of City Development of Amarillo, Tex.; *M. W. Martin* for Pine Bluff Grain Exchange; *F. E. Potts* for Helena Traffic Bureau; *L. Carter Johnson* for Ritchie Grocer Company, Plunkett-Jarrell-Dilby Company, Southern Grain & Produce Company, Logan Grocer Company, Hope Chamber of Commerce, El Dorado Chamber of Commerce, and Hot Springs Chamber of Commerce; *J. W. Shorthill* for Farmers National Grain Dealers Association and Farmers Elevator Association of Nebraska; *J. A. Little* for North Dakota Fair Freight Rate

Association and Farmers National Grain Dealers Association; *Clyde M. Reed* and *Bernard L. Glover* for Southwest Missouri Millers Association, Farmers Educational & Cooperative Union of America, Kansas State Farm Bureau, Farmers Cooperative Grain Dealers Association, Farmers Cooperative Commission, Kansas State Grange, Southwestern Cooperative Grain Marketing Association, and Kansas Cooperative Wheat Marketing Association; *Ed. P. Byars* and *Frank A. Leffingwell* for Texas Industrial Traffic League, Texas Wheat Growers Association, Texas Grain Dealers Association, Panhandle Grain Dealers Association, West Texas Chamber of Commerce, East Texas Chamber of Commerce, Fort Worth Grain & Cotton Exchange, Amarillo Board of City Development, Dallas Chamber of Commerce, El Paso Freight Bureau, Houston Chamber of Commerce, Galveston Chamber of Commerce, Port Arthur Chamber of Commerce, San Antonio Freight Bureau, and Waco Chamber of Commerce; *Emuel J. Forman*, *R. P. McCarthy*, *R. S. Sawyer*, and *F. A. Jones* for Globe Grain & Milling Company, California Milling Corporation, Capitol Milling Company, Pasadena Milling Company, and Associated Jobbers & Manufacturers of Los Angeles; *E. B. Smith* for Sperry Flour Company; *R. P. McCarthy* for Edward L. Eyre & Company, Hart-Hill Grain Company; C. B. Westrope & Company, R. Volmer, Kerr-Gifford & Company, and E. Clemens Horst Company; *B. H. Carmichael* and *P. W. Turcotte* for Taylor Milling Company, Poultrymen's Cooperative Milling Association; Nichols Grain & Milling Company; Huffine Grain Company, and Dairymen's Feed & Supply Company; *C. S. Connolly* for Albers Brothers Milling Company; *J. E. McCurdy* for Poultry Producers of Central California; and *J. Geo. Mann* for Farm Seed Association of N. A., and American Seed Trade Association; *Joseph M. Teal* and *William C. McCulloch* for Port of Portland, Commission of Public Docks, Portland Chamber of Commerce, and Portland Traffic & Transportation Association; *John H. Dunbar* and *H. C. Brodie* for Department of Public Works of State of Washington; *Bradford & Synder* for Port of Seattle; *Homer T. Bone* for Port of Tacoma; *S. J. Wettrick* for parties in brief; *Leonard C. Young* for Board of Railroad Commissioners of State of Montana; *John H. Dunbar*, *H. C. Brodie*, *John C. Denney*, *James P. Neal*, and *C. Rex Moore*, for Department of Public Works of Washington; *R. D. Lytle* for North Pacific Millers Association; *S. J. Wettrick* for Port of Seattle, Port of Tacoma, Chamber of Commerce of Seattle, Chamber of Commerce of Tacoma, and Columbia Basin Rate Committee of Walla Walla; *Arthur M. Geary* for Washington State Farm Bureau, Washington State Grange, Washington Farmers Union, Umatilla County Farm Bureau, Oregon State Grange, Oregon Farmers

Union, and Idaho State Grange; *L. S. McIntyre* for Seattle Chamber of Commerce; *Jay W. McCune* for Tacoma Chamber of Commerce; *W. S. Cahill* for Port of Seattle; *Geo. W. Osgood* for Port of Tacoma; *Charles H. Paul* and *Guy L. Anderson* for Longview Chamber of Commerce; *T. P. Fish* for Port of Kelso, Longview, Wash.; *G. C. Fulton* and *A. C. Fulton* for Port of Astoria; *S. J. Wettrick* for Fisher Flouring Mills Company and White-Dulaney Company; *N. E. Williams* for Chamber of Commerce of Fargo; *J. D. Kent* and *E. G. Wylie* for Des Moines Elevator & Grain Company, Des Moines Board of Trade, and Greater Des Moines Committee; *L. N. Conyers* for Feed Manufacturers' Traffic Committee; *W. K. Cole*, *R. L. Morgenweck*, and *D. L. Kelley* for Sheridan Flouring Mills, Incorporated; *H. A. Bronson* and *T. A. Durrant* for State of North Dakota, North Dakota Mill & Elevator Association, and North Dakota Terminal Exchange; *C. T. Vandenover* for Southern Minnesota Mills; *W. H. Fitzpatrick* for St. Joseph Grain Exchange; *F. Gordon Willis* for Waggoner-Gates Milling Company; *A. R. Kinney* and *Gerome V. Topping* for Southwestern Millers' League; *E. H. Hogueland* for Board of Trade, Kansas City, Mo.; *J. J. Hartnett* for Kansas Flour Mills Corporation; *E. H. Tipton* for Larabee Flour Mills Company; *O. W. Tong* for Minnesota-Dakota Transit Millers; *Sydney Anderson*, *A. P. Husband*, *E. Stanley Wagner*, and *Herbert J. Campbell* for Millers' National Federation; *J. A. Little* for Superior Traffic Association, and Central Nebraska Grain Shippers Association; and *William Church Osborn*, *Greenville Clark*, *Henry J. Friendly*, and *Ernest S. Ballard* for security holders' committees for a fair return.

H. C. Wilson for Sioux City Grain Exchange; *F. S. Keiser* for Duluth Board of Trade; *C. B. Rader* for Wichita Board of Trade; *J. S. Brown*, for Board of Trade of City of Chicago; *J. L. Bowlus* for Chamber of Commerce of City of Milwaukee; *J. B. McGinnis* for Memphis Merchants Exchange; *Carl Giessow*, *Edgar Moulton*, *Nuel D. Belnap*, *John S. Burchmore*, and *Luther M. Walter* for New Orleans Joint Traffic Bureau; *Ray Williams* for Board of Trade of Cairo, Ill.; *J. L. Collyer* for Peoria Board of Trade; *Frank B. Townsend* for Minneapolis Traffic Association; *Edward P. Smith* and *John A. Kuhn* for Omaha Grain Exchange; *Mart H. Royston*, *Fred N. Oliver*, and *E. H. Thornton* for Galveston Chamber of Commerce, Galveston Cotton Exchange & Board of Trade, and Texas City Board of Trade; *F. P. Willette* for Atchison Board of Trade; *D. J. Schuh* for Cincinnati Board of Trade, Incorporated; *W. R. Scott* for Board of Trade of Kansas City, Mo.; *A. F. Vendergrift* for Louisville Board of Trade; *W. J. Hanning* for Owensboro Chamber of Commerce; *F. A. Wilkins* for St. Joseph Grain Exchange; *E. P.*

Costello for Merchants Exchange of St. Louis; *F. Bradford* for Sioux City Grain Exchange; *H. A. Thompson for Leavenworth Chamber* of Commerce, Inc.; *R. T. Willette* for Chamber of Commerce of Kansas City, Kans.; *J. W. Holloway* for Board of Trade of Kansas City, Mo.; *Ralph Merriam* for Board of Trade of Kansas City, Mo.; *H. J. Fernandez* for Traffic Bureau, Monroe, La.; and *W. S. Cornell* and *E. B. Wilson* for Chamber of Commerce, Shreveport, La.; *H. J. Wagner* for Norfolk Chamber of Commerce; *R. F. Cooke* for Texas Wheat Growers Sales Corporation; *Y. H. Sparrow* for Great West Mill & Elevator Company; *C. L. Lockwood* for Wilson Company, Floersheim Mercantile Company, Mesquero Elevator Company, *R. C. Daniels*, and Maxwell & Hillyer Grain Company; *J. F. Adams* for Delmar Company, and Archer Daniels Midland Company (Grain Department); *S. C. Bates* for Jobbers & Manufacturers Association, Springfield, Mo.; *F. W. Lipscomb* for Lipscomb Grain & Seed Company; *J. A. Copenhover* for Tindle Milling Company; *H. J. Meyer* for Meyer Milling Company; *J. K. Woodfill* for Middlestates Milling Company; *C. F. Davis* for Missouri Farmers Association; *E. E. Maschall* for Shellabarger Mill & Elevator Company; *J. L. Hogan* for Abilene Flour Mills; *W. B. Brown* for Security Flour Mills; *R. Morgenstern* for H. D. Lee Flour Mills; *Fred Martin* for Robinson Milling Company; *W. C. Nichols* for Western Star Milling Company; *E. W. Adams* for E. L. Ridrel Grain Company; *J. O. Kocher* for Cowgill Flour Mills, McDaniel Milling Company, McDaniel Grain & Elevator Company, Morrow Milling Company, Ball & Gunning Milling Company, and Brand-Dunwoody Milling Company; *J. M. Herndon* for Rodney Milling Company; *Herman Mueller* and *E. H. Berg* for St. Paul Association; *Frank B. Townsend* and *Lee Kuempel* for Minneapolis Traffic Association; *A. S. Boden* for Aberdeen Commercial Club; *A. B. Ayers* for Cream of Wheat Company; *Carl C. Johnson* for Halbit & Carey Company; *P. F. Schennemann* for Monarch Elevator Company; *W. H. Perry* for Pillsbury Flour Mills Company; *L. D. Veltum* for Northwestern Consolidated Milling Company; *M. H. Strothman* for Washburn-Crosby Company; *D. A. Small* for Archer Daniels Midland Company; *H. S. Felbus* for Van Dusen Harrington Company; *Gustav Mehlin* for W. J. Jennison Company; *H. D. Driscoll* for Oklahoma City Mill & Elevator Company, The Oklahoma Mill Company; *R. E. Hughes* for New Era Milling Company; *J. B. McGinnis* for Lucius P. Cook, American Grain & Hay Company, Embry E. Anderson, Royal Feed & Milling Company, United States Feed Company, and John Wade & Sons Company; *H. C. Wilson* and *G. F. Nicolin* for Sioux City Grain Exchange and Mystic Mills; *Otto Mortensen* for Cargill

Elevator Company; *Chas. W. Mittendorf* for Hutchison Chamber of Commerce; *J. D. Youman* for Board of Commissioners of Port of New Orleans.

L. G. Macomber for Toledo Produce Exchange; *Frank S. Davis* for Maritime Association of Boston Chamber of Commerce, Boston Grain & Flour Exchange, and Port of Boston; and *Mayer, Meyer, Austrian & Platt* for Great Lakes Transit Corporation.

M. L. Countryman, jr., Charles A. Hart, J. N. Davis, A. H. Lossow, and *R. J. Hagman* for northern carriers; *Walter McFarland, Elmer A. Smith, P. F. Gault, Douglas F. Smith, R. S. Outlaw,* and *A. B. Enoch* for carriers in western trunk-line and southwestern territories; *D. P. Connell* for official classification lines; *J. M. Souby, Douglas F. Smith, A. C. Spencer,* and *W. A. Robbins* for Union Pacific system lines in Oregon, Washington, Idaho, and Utah; *L. H. Strasser* and *Ralph M. Shaw* for carriers in western district; *J. M. Souby, Douglas F. Smith,* and *E. E. Bennett* for certain defendants; *J. N. Davis, P. F. Gault, Walter McFarland, R. S. Outlaw, Kenneth L. Richmond,* and *Elmer A. Smith* for carriers in Illinois; *Elmer Westlake, R. S. Outlaw, Robert Brennan, Berne Levy,* and *Platt Kent* for Atchison, Topeka & Santa Fe Railway Company; *Frank H. Moore* and *Wm. E. Davis* for Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company; and *J. R. Bell, G. H. Muckley, James E. Lyons,* and *A. Burton Mason* for Suthern Pacific Company.

Report of the Commission

By the Commission:

This is an inquiry into rates and practices affecting the transportation of grain and grain products throughout the western district (on and west of the Mississippi River, including east-bank crossings) and in Illinois; from lower lake ports to Atlantic ports on ex-lake grain (grain transported across the Great Lakes to lower lake ports); and from all points in the western district to all ports of export.

Primarily the grains here under consideration are wheat and coarse grains, also flaxseed. The coarse grains are mainly corn, oats, rye, and barley. The grain products are chiefly flour and mill feeds, although the investigation includes all the grain and grain products (also seeds) contained in the carriers' comprehensive tariff list of grain and grain products shown in Appendix B. Except on some transcontinental traffic westbound and in some of the territory west of the Rocky Mountains, the rates on the products of grain, including flour, are the same as on the grains from which the products

are made. The rates on coarse grains are the same as on wheat west of the Rocky Mountains, in Illinois, and in the territory east of the Mississippi River and the Great Lakes, and 90 per cent of the rates on wheat in the plains States east of the Rocky Mountains, including the Southwest. Throughout the entire western district the practice is universal of permitting both wheat and coarse grains to be stopped for milling and other treatment in transit, at the direct rate on the grain or its product from origin of the grain to final destination of the product, except that in some parts of the Northwest an extra transit charge is made. These various situations will be referred to in more detail later.

INVESTIGATION DIRECTED BY HOCH-SMITH RESOLUTION

The proceeding is instituted under the provisions of the interstate commerce act, as directed by the Hoch-Smith resolution.[2] The testimony mainly concerns wheat. The relation of rates on wheat and coarse grains, and on grain and grain products, will be the subject of discussion under later appropriate headings. Rates referred to, unless otherwise specified, are on wheat, and are stated in cents per hundred pounds.

DEPRESSION IN AGRICULTURE

Voluminous testimony concerning conditions in agriculture, especially as affecting the wheat farmer, was offered by witnesses called on behalf of both shippers and carriers. These witnesses included farmers and representatives of farm organizations in Kansas, Oklahoma, Nevada, North Dakota, South Dakota, Minnesota, Idaho, Montana, Oregon, Washington, and other States, and men engaged in governmental, banking, scholastic, and other contacts with agriculture, some of whom we invited to give their impartial views. The range of the evidence of these witnesses covered, as of the period from immediately preceding the World War down to the then present dates, (1) the general trend of production costs and prices, and the purchasing power of the dollar, as tested by so-called indexes used in governmental and other reports; (2) bank failures, decline in land values and wheat prices, crop failures, abandonment of farms, and increases in farm and chattel mortgages in agricultural districts; and (3) general impressions of individuals concerning agricultural conditions as a whole within their personal observation. This evidence is summarized and commented on in detail in Appendix C. It is sufficient to say here that while conditions affecting the

[2] Public Resolution No. 46, 68th Congress, 43 Stat. L., 901, set forth in full in Appendix A to *Ex Parte 87, Revenues in Western District*, 113 I. C. C., 3, 40

grain farmer had been improving within the few years immediately preceding the hearing herein there is still depression in the grain industry.

THE QUESTION OF A GENERAL RATE REDUCTION

The question here presented is whether, under present conditions, the rates on grain and grain products throughout the western district are reasonable and just and are properly related to each other and to the rates on other traffic. The answer must take into account not only comparisons of distance, transportation conditions, and ton-mile and car-mile earnings on grain and other commodities, but also whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by law, including section 15a of the interstate commerce act, which we construe to permit, but not to guarantee, the carriers to earn 5.75 per cent on the fair value of the property devoted to the transportation service.

FINANCIAL CONDITION OF CARRIERS IN THE WESTERN DISTRICT

The percentage rates of return of Class I carriers in the western district, by regions, for the calendar years 1921–28 were as follows:

	Regions			Western district
	Northwestern	Central western	Southwestern	
1921	1.42	4.45	3.17	3.12
1922	2.78	4.07	3.27	3.48
1923	3.45	4.50	3.65	3.96
1924	3.12	4.21	4.34	3.87
1925	3.60	4.41	4.37	4.13
1926	3.83	4.86	4.56	4.45
1927	3.40	4.28	3.98	3.92
1928	4.04	4.59	4.32	4.35

The above percentages are computed on the investment of the carriers, as shown by their books, including materials and supplies and cash as of the beginning of the year.

For 10 railroads having 75 per cent or more of their mileage in western trunk-line territory[3] the average rate of return on book value was 2.97 per cent in 1927. In that year also, on the same basis as used in the table above, the returns for individual carriers were 3.66 per cent for the Chicago & North Western, 4.53 per cent for the Chicago, Burlington & Quincy, 4.26 per cent for the Illinois Central, 5.06 per cent for the Atchison, Topeka & Santa Fe system,

[3] Chicago & Alton; Chicago & North Western; Chicago, St. Paul, Minneapolis & Omaha; Chicago, Burlington & Quincy; Chicago Great Western; Chicago, Milwaukee, St. Paul & Pacific; Minneapolis & St. Louis; Minneapolis, St. Paul & Sault Ste. Marie; Green Bay & Western; Quincy, Omaha & Kansas City.

4.49 per cent for the Union Pacific system, and 3.71 per cent for the Southern Pacific Company. For the years 1921–1927, inclusive, the Oregon-Washington Railroad & Navigation Company earned 1.02 per cent on its book value. The composite earnings of the Great Northern, Northern Pacific, and Minneapolis, St. Paul & Sault Ste. Marie in 1927 yielded 4.75 per cent on our valuation, without considering subsequent investment. During the seven years after the termination of Federal control these roads were short $189,775,069 of making a 5.75 per cent return on property investment and $136,265,151 short of that return on our valuation. In the year 1927 the corresponding shortage was $12,758,736 on our valuation. The Great Northern and Northern Pacific during the 10-year period 1916–1926 added $216,144.016 to their investment, but in 1926 their net railway operating income was $3,394,410 less than for the year ended June 30, 1916, before they made this additional investment. The foregoing statements were practically undisputed upon this record.

PROPORTION OF GRAIN TRAFFIC

Grain and grain products constitute a substantial part of the tonnage of the carriers of the western district, as the following tables will show:

Grain and grain-products revenue percentage of total revenues in 1924

Western district	12.1
Northwestern region	16.3
Central western region	10.7
Southwestern region	8.9
G. N.–N. P.–Soo	20.0

Grain and grain-products percentage

	Of total carload tonnage	Of total carload revenues
C. & N. W.:		
1911–1915	13.3	19.6
1923–1926	10.9	12.6
C., M., St. P. & P., 1916	18.5	22.1
C., M., St. P. & P., 1926	10.2	11.5
C., B. & Q., 1916	17.21	18.05
C., B. & Q., 1926	13.13	12.47

Percentage of grain and grain products to total tonnage originated

	Percentage
C. & N. W. in South Dakota:	
Year 1923	59.3
Year 1926	25.1
C., M., St. P. & P. in 1926:	
South Dakota	35
North Dakota	36
Minnesota	43
Iowa	27

Proportions of agricultural products (including livestock) of total tonnage originated

	Per cent
C. & N. W. in 1923:	
South Dakota	86.4
Nebraska	77.7
C. & N. W. in 1926:	
South Dakota	75.5
Nebraska	74
Minnesota	78.4
Wisconsin	7.8
Illinois	8.7
C., M., St. P. & P. in 1926:	
South Dakota	74.9
North Dakota	61.4
Minnesota	60.3
Iowa	49.3

For the calendar year 1927 on class 1 railways of the western district, grain and grain products constituted of the total traffic 11.60 per cent of tons originated and 10.12 per cent of tons carried, including tonnage from connections. The grain products constituted 24.74 and 26.92 per cent, respectively, of the total grain and grain products, tons originated and tons carried.

COST STUDIES AND ANALYSES[1]

Various analyses purporting to show the aggregate costs of transporting wheat have been presented upon this record. One of these was prepared by the chief of our Bureau of Statistics, not as an official document, but as an expression of individual view. This will be referred to herein as the interstate study. It embraced the operations of all the carriers in the western district, and in Illinois, Wisconsin, and Minnesota. Another was prepared by the Minnesota Railroad and Warehouse Commission, and dealt with the Great Northern, Northern Pacific, and Minneapolis, St. Paul & Sault Ste. Marie railways, in Minnesota, North Dakota, Wisconsin, and Montana. A third was prepared by the Nebraska State Railway Commission, its three parts dealing respectively with the western trunk-line carriers, the southwestern carriers, and Nebraska. A fourth was submitted on behalf of Kansas farm organizations A fifth was submitted on behalf of the Public Service Commission of Oregon, to show the cost of freight service of one railroad in Oregon. The interstate study was a statistical analysis of data contained in the carriers' reports to us, and an attempt to allocate costs appropriately to wheat. The studies offered by the Minnesota and Nebraska commissions and the Kansas farm organizations were of the

[1] The text under this hearing is taken practically verbatim from our report to the Senate in *Ex parte 96, Propriety of Rates Similar to Canadian Rates on Grain, Live Stock, and Other Agricultural Products in the Northwest*, Senate Document No. 183, 70 Congress, 2nd Session, in which these same cost analyses were discussed.

same general character. In connection with the first four of these analyses the final showing was of a distance scale purporting to represent the lowest scale of rates that would be justified by consideration alone of cost of service plus a 6 per cent return on that part of the property assignable to the movement of wheat, and purporting to show also that rates could be materially reduced from the standpoint of cost of service. The study submitted on behalf of the Oregon commission suggested no scale of rates, but purported to show that rates on wheat in Oregon might be substantially reduced. This study was confined primarily to Oregon intrastate shipments and was not as general in character as the other studies mentioned.

The cost formulas themselves recognize that the cost of transporting grains other than wheat, as well as flour and other grain products, which load substantially lighter than wheat, is greater than the cost of transporting wheat. In the interstate study, for a haul of 500 miles, for example, the cost of transporting flour and meal is recognized as being approximately 28 per cent higher than on wheat. Despite these differences in cost the rates on grain products, including flour, are the same, with some exceptions, as on the grain from which the products are made; the rates on coarse grains are the same as on wheat in some sections, and 10 per cent less than on wheat in others, as already stated; and grain may be milled in transit at intermediate points at the through rate, instead of at the higher combination on the milling point, without extra charge for the stopping in transit, except that on shipments from the Northwest to Puget Sound and Columbia River ports, and to Lake Superior ports and the Twin Cities, an extra milling charge of from 1.5 to 2.5 cents per hundred pounds is usually made.

It will be understood that under the theory of these analyses the showing as to any grain or grain product will be duplicated as to any other commodity of the same loading irrespective of relative values and densities of tonnage;[5] that the distance scale reflecting this analysis makes no provision for competitive routes of varying mileages or for differences in character of country, density of traffic, or other incidents of transportation; and that, in order to compensate for these contingencies, the scale would have to be increased. The carriers criticize the analyses for not taking into consideration these

[5] In other words, the showing as to wheat is based on average unit costs for commodities moving in box cars and having the load per car of wheat, and does not rest on an allocation of costs to specific movements of wheat, actually observed.

and many other things, such as the character of equipment required, the assembling of empty cars for wheat movement, the furnishing of grain doors, etc., which are important items of cost.

The contention is not advanced in connection with any of these analyses that rates should be based solely on the cost of service. It was not denied by the proponents of these studies that other considerations should also be given weight, and that the proposed distance scales merely represented, as already stated, levels of charge that would not be considered too low from the standpoint alone of the cost of service plus a 6 per cent return on investment. The Kansas farm organizations, which actively participated in this inquiry, while fully adopting the theory and results of the interstate study, expressly rejected any proposal to make rates solely on the basis of cost, and proposed a scale of rates on wheat which is substantially higher than the scale proposed in that analysis.

GENERAL SURVEY OF RATE RELATIONS REQUIRED

The record requires a general survey of the rates on grain and grain products throughout the western district from the standpoint not only of cost, but of general transportation conditions as well. The relation of rates, as well as the general level, is within the scope of the investigation. The discussion first will be mainly of wheat. It will be necessary in this connection to discuss general crop and marketing conditions in their relation to rates.

WHEAT CROP AND TREND OF MOVEMENT

The average wheat crop of the United States is approximately 800,000,000 bushels, of which about 200,000,000 bushels, in the form of wheat or flour, are exported. The country's surplus wheat is produced largely west of the Missouri River. East of that river the surplus is small, except in the Dakotas. The winter-wheat belt comprises Oklahoma, Kansas, eastern Colorado, southern Nebraska, and the Panhandle of Texas. The spring-wheat belt includes Minnesota, the Dakotas, and Montana. Both winter and spring wheat are raised in Utah, Idaho, Washington, and Oregon. The time of harvest ranges from May to October in the various localities. The heaviest movement, both to the markets and to the ports of export, is within about three months after harvest. This period is being materially shortened through the increasing use of the combine, a combination reaper and thresher. There is a later steady movement throughout the year, more particularly from the markets.

With the exception of the Washington and Oregon wheat, which moves at all times mainly to exporters and millers at Puget Sound and Columbia River ports, including Seattle, Takoma, and Portland, and of Oklahoma and Texas wheat, which moves at times to the Gulf ports direct, the initial movement is largely to interior market and milling points, such as Denver, Wichita, and Fort Worth, and to the primary markets, variously defined, such as Duluth, Minneapolis, Sioux City, Omaha, St. Louis, Chicago, and Kansas City. Wheat received at a primary market may be promptly milled or it may be resold and placed in storage. Some of it is eventually sold to other markets and to millers, maltsters, and other manufacturers of grain products in the direct, and sometimes indirect, line of flow of the wheat to final consuming territories or ports of export.

The heaviest movement of wheat, in the form of wheat or its products, is to the East. Wheat from the northern tier of States (Montana, North Dakota, South Dakota, and Minnesota) moves to the East principally through Minneapolis and Duluth. The outbound shipments from Duluth, which has a limited milling capacity, are principally of grain, which moves, during the period of open navigation, over the lakes to Georgian Bay ports, thence over rail routes to Montreal or Quebec; over the lakes to Buffalo, thence via the Welland Canal, Lake Ontario, and the St. Lawrence River to Montreal or Quebec; or over the lakes to Buffalo, thence via the New York State Barge Canal to New York, or over rail lines to New York and other eastern ports; and, during the period of closed navigation, over the rail routes through Chicago. Outbound shipments from Minneapolis are largely of flour and are over rail-lake-and-rail routes through Duluth and Buffalo, or over rail routes through Chicago.[1] Wheat from Colorado, Nebraska, and Kansas moves principally over rail routes through the Missouri River gateways and Chicago or St. Louis. The Missouri River gateways are Sioux City, Council Bluffs, Leavenworth, Omaha, Atchison, St. Joseph, and Kansas City. These gateways, with Minneapolis, Duluth, St. Louis, Peoria, Chicago, Milwaukee, and other important markets for grain, will be referred to as the primary markets. On the north Pacific coast, Seattle and Portland are important terminal markets.

[1] The water and water-and-rail routes described from Duluth are also available from Chicago and Milwaukee. The lake-cargo rates on wheat from Duluth, Chicago and Milwaukee are contract rates beyond our jurisdiction. The rail-and-lake rates on flour are tariff rates published by common carriers within our jurisdiction.

METHODS OF RATE MAKING

There are three different bases of rates available on wheat to and from the primary markets, namely, (1) combination of flat rates in and out; (2) combination of flat rates in and proportional or reshipping rates out; and (3) overhead rates with transit. These and other rate descriptive terms used herein may be defined as follows:

A flat rate is either a local rate of a single carrier or a joint rate of two or more carriers published as a unit and not dependent for application on any previous or subsequent transportation.

A proportional rate is a local or joint rate dependent for application upon (1) a previous transportation to the point from which the proportional rate applies; (2) a subsequent transportation from the point to which the proportional rate applies; (3) or both.[1] It is supposed to be a part of a through rate and is usually lower than the flat rate between the same points. When dependent upon previous inbound transportation it is applicable only upon surrender of the inbound paid freight bill showing the transportation of the shipment inbound. The freight bill need cover only an equivalent inbound tonnage, as preservation of identity grain is not required.

A reshipping rate is the same thing as a proportional rate.

An ex-lake rate is a proportional rate, applicable from lower lake ports to the East on shipments previously transported across the Great Lakes.

An overhead rate with transit is a flat or proportional rate under which shipments may be stopped at an intermediate point for marketing, milling, or other recognized transit purpose, and in the absence of which the through charge would be the lowest combination of applicable rates to and from the transit point.

A transit balance is an incident of an overhead through rate with transit. Shipments are billed inbound to the transit point at the flat rate. On the outbound shipment the amount paid is the difference between the through rate from the point of origin to final destination and the flat rate from the point of origin to the transit point. This difference is known as the transit balance.

Sometimes overhead through rates are published through primary markets on a basis different from the combinations of flat rates to the markets and proportional rates beyond. If higher than the

[1] Illustrations are proportional rates: (1) from Omaha to Chicago on grain previously brought into Omaha by rail; (2) from St. Louis to Memphis on grain for subsequent shipment to the Southeast; and (3) from St. Louis to Cairo on grain previously brought into St. Louis by rail and to be subsequently shipped from Cairo by rail.

combinations, they would violate the fourth section. Sometimes they are on the combination basis and published in the form of overhead through rates for convenience. As a practical matter they are usually on the combination basis, or lower than that basis. When lower, the transit balance is of necessity lower than the proportional rate and, under the rule that an overhead 1-factor through rate takes precedence over any combination, the transit balance must prevail.

All shipments to markets (except as stated in footnote [8]) are billed in at flat rates. Whether outbound shipments are at proportional rates or transit balances depends upon the selection of the inbound freight bill. If the inbound freight bill covers a shipment from an origin point from which there is no overhead rate with transit to final destination, the outbound shipment is at the proportional rate. But grain from a point from which there is no overhead rate with transit can, under present practice, be substituted for wheat from a point from which there is such an overhead rate with transit, and can be forwarded, upon presentation of the inbound expense bill covering inbound transportation from the latter point, at the transit balance due that expense bill. The transportation service, recording of freight bills, keeping of records, and all incidents of the entire transaction of shipment to and from the primary market are the same whether the outbound shipment is at the transit balance or the proportional rate.

THE RATE-BREAK PLAN

For many years through rail rates on grain and grain products have been largely the combinations of flat rates to and proportional rates from the primary markets, or the so-called rate-break combinations. Illustrative of these combinations are flat rates to Minneapolis, proportional rates to Chicago, and proportional rates beyond; flat rates to Omaha or Kansas City, proportional rates to Chicago or St. Louis, and proportional rates beyond; and flat rates to Chicago and St. Louis, and proportional rates beyond.

There is also a natural breaking of rates over the lake ports, by the combination of flat rates to Duluth [9] or Chicago, steamer rates to Buffalo, Georgian Bay, and other lake ports, and ex-lake rates beyond.

---

[8] When the combination of proportional rates between primary markets is superseded by the application of the proportional rate to the final market, with transit at the intermediate market, the inbound billing is at the proportional to the intermediate market.

[9] Shipments from certain territories to Duluth, through Minneapolis, pay the combination of flat rates to Minneapolis and the proportional rate beyond.

ORIGIN OF PROPORTIONAL RATES

The first proportional rates were the result of the competition of carriers for shipments out of primary markets of grain brought into those markets by lines with which they did not participate in overhead through rates with transit. Thus the Chicago Great Western, when it built into Omaha from Chicago, established as proportional rates from Omaha to Chicago the transit balances of through rates from west of Omaha to Chicago, with transit at Omaha, to which the Chicago Great Western was not a party. Lines operating from Omaha to Kansas City likewise published as proportional rates from Omaha to Kansas City the transit balances of through rates from west of Omaha to Kansas City, with transit at Omaha, to which they were not parties. Later proportional rates on grain and its products were established from, to, and between primary markets and established gateways, including the Missouri, Mississippi, and Ohio River markets and gateways, the lake ports, and certain interior points. Proportional rate points to-day include Sioux City, Omaha, St. Joseph, Atchison, Kansas City, Des Moines, St. Louis, Peoria, Chicago, Milwaukee, Minneapolis, Duluth, Cairo, Evansville, Memphis, and New Orleans. There are also proportional rates from the primary markets and gateways to consuming territories, such as from Omaha, Kansas City, and St. Louis to Texas, Louisiana, and Arkansas. Many of the proportionals were published for equalizing purposes.

RATE-BREAK EQUALIZATION OF ROUTES

There is a certain amount of equalization of routes and gateways under the present rate-break plan. Thus from North Dakota and Montana the rates to Chicago are the same through Minneapolis and Duluth, inasmuch as the flat rates are the same inbound and the proportional rates the same outbound. The proportional rate is the same from all of the Missouri River gateways to Chicago; also to St. Louis except that from Sioux City the rates are higher than from Omaha and Kansas City. There is a reshipping rate from Chicago to New York, applicable on all shipments with a previous rail transportation to Chicago, and reshipping rates to other north Atlantic ports on the basis of fixed differentials over or under New York. The through rate-break combination on Chicago is therefore the same from all Missouri River markets to New York and other north Atlantic ports. It is also the same through St. Louis and Peoria as through Chicago, inasmuch as the inbound

rates to St. Louis and Peoria are as much less than to Chicago as the outbound rates from St. Louis and Peoria are more than from Chicago. The situation therefore is that, except from Sioux City through St. Louis, shipments from the Missouri River gateways can move at the same aggregate charge to New York through either St. Louis, Peoria, or Chicago. The same is true of shipments from west of the Missouri River gateways, which generally move on rate-break combinations on those gateways. From eastern Colorado the rate is the same to all of the Missouri River gateways.

There is a similar equalization of routes and gateways from the Missouri River to southeastern and Carolina territories, only to an even greater extent, inasmuch as the rate-break combinations are the same through St. Louis and Memphis as through St. Louis and Cairo, Evansville, Louisville, or Cincinnati.

To Memphis, New Orleans, and other points in Mississippi Valley territory rates from Omaha are made on rate-break combinations over all intermediate markets except Kansas City—the rates to Memphis by combination on St. Louis, and the rates to New Orleans by combination on St. Louis and Memphis. From Kansas City the rates are made 1 cent less than the rates from Omaha. From Sioux City the proportional rate to Omaha is added.

A similar combination and equalization basis obtains to a considerable extent in connection with the rates from the Missouri River gateways to the Southwest. Thus, to Texas, Louisiana, and Oklahoma rates from Omaha are made by combining the proportional rates to and from Kansas City, and rates from Sioux City are made by combining the proportional rates to and from Omaha and Kansas City. To Texas and Louisiana the proportional rates are the same from St. Louis and Kansas City.

WIDE USE OF TRANSIT BALANCES

The rate-break through primary markets is not exclusively employed, however. There are, as stated, many overhead through rates with transit at the primary markets lower than the combinations on the primary markets and, therefore, many transit balances less than the proportional rates. These overhead rates apply through markets on both direct and indirect routes. The proportional rate from one primary market to another is frequently made applicable with transit at an intermediate primary market, in lieu of the combination of proportional rates to and from the intermediate market. The following are typical instances of transit balances on wheat:

1. From southern Nebraska to St. Louis and Chicago, the Omaha combinations, lower than the Kansas City combinations, are published as through rates with transit at Kansas City.

2. The flat rate of 19.5 cents from Omaha to St. Louis is applicable with transit at Kansas City upon payment of the proportional rate of 8 cents from Omaha to Kansas City and a transit balance of 11.5 cents, in lieu of the combination of proportional rates of 8 cents to and 13.5 cents beyond Kansas City. This rate, representing the proportional rate of 13.5 cents from Omaha to St. Louis, plus the flat rate of 6.5 cents to Omaha from the first station directly intermediate to Omaha, applies as maximum at points intermediate to Omaha, and produces transit balances less than the proportional beyond Kansas City from a considerable strip of producing territory directly between Omaha and St. Louis.

3. From parts of South Dakota to Chicago the rate-break combinations through Minneapolis, lower than through Sioux City, are published as through rates with transit at Sioux City.

4. From some origins south of the line of the Chicago & North Western from Mankato, Minn., west to Pierre, S. Dak., direct through rates to Chicago, less than the Minneapolis combinations, are made applicable through Minneapolis with transit.

5. The proportional rate of 17.5 cents from Kansas City to Chicago is applicable with transit at Omaha in lieu of the combination of proportional rates of 8 cents to Omaha and 17.5 cents beyond.

6. The proportional rate of 17.5 cents from Omaha to Chicago is applicable with transit at Minneapolis upon payment beyond Minneapolis of arbitraries of 11 cents on shipments to Chicago proper and 8 cents on shipments to Chicago destined to points east of the Indiana-Illinois State line, in lieu of the proportional rate of 13 cents otherwise applicable in each instance.

7. The proportional rate of 17.5 cents from Sioux City to Chicago applies with transit at Omaha, in lieu of the combination of proportional rates of 5 cents to Omaha and 17.5 cents beyond.

8. The proportional rate of 16.5 cents from Omaha to Evansville, Ind., applies with transit at Chicago upon payment of the proportional rate of 17.5 cents from Omaha to Chicago, with the result that there is no transit balance beyond Chicago, but a credit of 1 cent, which is applied on shipments from Evansville to the Southeast.

9. The export rate of 24.5 cents from Omaha to New Orleans applies with transit at Chicago upon payment of the proportional rate of 17.5 cents from Omaha to Chicago and the transit balance of 7 cents from Chicago to New Orleans.

10. There are through rates less than the rate-break combinations on Omaha, Kansas City, and St. Louis from Illinois, Iowa, and Missouri to Texas, Louisiana, and Arkansas.

11. There are through rates less than the combinations on Omaha, Kansas City, and St. Louis from west of the Missouri River to Memphis and New Orleans.

It will be understood that these transit balances apply on any grain in the primary-market elevator, upon surrender of the required inbound billing. For example, the rate on through shipments of wheat from Kansas to Chicago is the flat rate to Kansas City, plus the proportional rate of 17.5 cents beyond, but Kansas wheat stopped at Kansas City for merchandising, milling, or other purpose, may move out of Kansas City to Chicago at 9.5 cents upon surrender of an expense bill showing the inbound shipment of an equivalent amount of wheat from Omaha to Kansas City.[10] Therefore, the statement frequently made that rates from trans-Missouri territory to the East are combinations on the Missouri River markets is misleading. It is true that the usual basis of charge from that territory to the Atlantic seaboard is the combination on some Missouri River market, and on Chicago and St. Louis, under the equalization basis hereinbefore described; but it is not true that all grain shipped outbound from the Missouri River to Chicago and St. Louis pays the proportional rates. On the contrary, a substantial, if not the greater, part of the outbound tonnage from the Missouri River to both Chicago and St. Louis pays transit balances less than the proportionals. The same situation largely obtains in respect of shipments outbound from Minneapolis that have been stopped at that market.

To the Southwest transit balances also apply on a substantial percentage of the total traffic beyond Omaha, St. Louis, and Kansas City. The proportionals from Kansas City to the Southwest appear in fact to be rarely used. To this territory there is a similar use of the transit balance in lieu of the proportional rate from Cairo, Ill., and Memphis, Tenn.

To the Mississippi Valley, including Memphis and New Orleans, the situation is largely the same. To New Orleans the rates are less than the combinations on Omaha or Kansas City from Nebraska and from parts of northern Kansas. To both Memphis and New Orleans the rates are lower than the combinations on Kansas City from southern Kansas, and transit balances of these rates from Kansas City and St. Louis afford the only means of those markets reaching the Mississippi Valley with wheat and flour from west of the Missouri River. The Mississippi Valley adjustment will be referred to in more detail later.

---

[10] The proportional rate to Chicago is 17.5 cents from both Omaha and Kansas City. The proportional rate from Omaha to Kansas City is 8 cents. The 9.5 cents is the transit balance beyond Kansas City of the proportional rate of 17.5 cents from Omaha to Chicago, applied with transit at Kansas City.

It will be seen that, because of overhead through rates less than the rate-break combinations, the proportional rates from and between the primary markets have come largely into a state of disuse. To the Southwest and the Mississippi Valley this is due largely to the general percentage revisions of rates beginning with General Order No. 28 of the Director General of Railroads, which increased wheat rates 25 per cent, subject to a maximum increase of 6 cents. Many of these rates, published as overhead rates on the combination basis, were increased less than the aggregate increase in the components, and therefore became less than the rate-break combinations.[11] The market combinations were largely restored by freight-rate authority No. 7908 of the Director General of Railroads on December 31, 1919, but the remaining differences were affected by subsequent general percentage revisions. The combinations on the markets to the East were not published as overhead through rates, and the through rates did not become lower than the combinations as a result of these percentage revisions.

From Colorado, Nebraska, and Kansas to the Mississippi Valley an even greater disturbance of the relation between through rates and rate-break combinations resulted from *Rates to, from, and between Points South of Ohio River*, 64 I. C. C. 306. As a result of that proceeding the proportional rates from St. Louis to Memphis and New Orleans were substantially increased, Omaha was continued on the St. Louis combination, and Kansas City was continued 1 cent under Omaha. Similar increases were made in the flat rates from Omaha and Kansas City, but from points west of the Missouri River the increases were limited to points from which the through rates were lower than the increased flat rates from Kansas City and Omaha, which were published as maxima, although through rates from South Dakota, Minnesota, Illinois, Iowa, and northern Missouri were continued on the St. Louis combination, and therefore reflected the full increases from St. Louis.

An important issue in this proceeding is whether the rates through the primary markets shall be made on the combination of flat rates to and proportional rates from the markets exclusively, or in part, or at all. There are proponents and opponents of each of these methods.

OBJECTIONS TO THE RATE BREAK

The main criticism of the rate break seems to be that the proportional rate can not be a reasonable addition to all inbound flat rates.

[11] For example, an overhead through rate of 50 cents was increased a maximum of 6 cents, and the components of 16 cents and 34 cents were increased 4 cents (25 per cent) and 6 cents (the maximum), respectively. From Kansas to Kansas City the maximum increase was 3 cents. The coarse-grain rates were increased to the wheat bases, where lower than that basis.

In other words, the flat rates into the markets, especially for the longer hauls, if continued at the rate of progression ordinarily used in a distance scale, would produce a through rate lower than that produced by the addition of the proportional. The proponents of this view are mainly shippers for the longer distances and certain of the State commissions. Nevertheless, these parties, with few if any exceptions, want the privilege of stopping shipments at the overhead rates at the intermediate primary markets. Most of them have no objection to breaking the rate at the primary market if its volume does not exceed a reasonable overhead rate level.

PROPONENTS OF PROPORTIONAL RATES

Other shippers and State commissions favor the rate break. The primary markets want the rate break, and some of them also want overhead through rates less than the rate-break combinations in some instances. Kansas City especially advocates the fullest possible application of its outbound proportional rates, not only as a preserver of Kansas City as a futures market, but as a stimulator of the futures price, and therefore of the directly related cash price paid to the producer. The situation in this respect is said by the primary markets, as we interpret their testimony, to be substantially as follows:

CASH AND FUTURES MARKETS

There are two kinds of primary markets, cash and futures. Futures markets are price-registering markets, and are also cash markets. The futures price is largely what the name implies, namely, the price of grain in some future month. On storage grain purchased in July, for example, the cash price is usually the September futures price minus the interest, storage, and insurance charges necessary to carry July wheat until the futures delivery date in September. The futures price is influenced by world conditions of supply and demand, and by the transactions of the futures traders, who make a business of buying and selling futures grain for a rise or fall in price. The cash operator, on the other hand, purchases grain for subsequent resale at a merchandising and storage profit of a few cents a bushel, not dependent on wide changes in price. As a matter of fact he protects himself from wide fluctuations by hedging, a form of insurance, which transfers much of the risk of substantial price change to the futures trader.[12] Thus the cash

[12] Hedging is said to be a necessary incident of the successful operation of cash-grain dealing, and is practiced by practically all of the cash-grain dealers, and by many of the millers and country elevators. The extension or amount of bank loans on grain is materially influenced by whether or not the grain is hedged. Hedging covers only the contract grades of wheat and not the premiums frequently paid for the higher grades.

trader purchases a quantity of cash wheat for later merchandising and immediately hedges it by selling an equal amount for future delivery, at a futures price representing the cash price plus the interest, storage, and insurance necessary to carry the cash wheat to the date of delivery under the futures contract. He is thereby assured of a sale of his purchased wheat for at least as much as he paid for it, plus his storage profit, if he can not in the meantime resell it as cash grain at a merchandising profit. If, as usually happens, he can remerchandise the cash grain prior to the date of its delivery under the futures contract, the necessity for his hedging insurance has terminated, but he is still obligated to deliver, under his futures contract, the amount of grain he has merchandised and therefore no longer has. He accordingly makes constructive delivery by purchasing the required amount of grain in the futures market, and thereby closes out his hedge.

Any profit from the sale of the cash grain, in addition to his merchandising and storage profit, is offset by the increased price of his repurchased grain under the second futures contract. Any loss from the sale of the cash grain is similarly offset by the reduced price of his repurchased grain under the second futures contract.[13]

DELIVERIES UNDER FUTURES CONTRACTS

In some instances cash grain is not sold prior to the date of delivery under the futures contract of sale entered into when the cash grain is purchased, and the cash grain is actually delivered under the futures contract of sale. It is then competitive with other cash grain. Out of the market it always pays the proportional rate, whereas much of the other outbound cash grain moves on transit balances.[14] The price under the futures contract must take into account the certain payment of the highest outbound charge on any grain delivered under that contract, and it therefore tends toward a lower level than it would reach if all outbound grain paid the same charge. This lower level of the futures price correspond-

[13] Hedging is an incident not only of cash grain purchased for storage and merchandising, but also of the sale of grain which has not yet been accumulated. Thus an exporter who sells a cargo of wheat which he has not yet accumulated immediately buys the wheat in the futures market, and when he buys the required amount of cash grain prior to the date of delivery under his futures contract he closes out his hedge by selling the required amount of futures. Here again any loss or gain in the cash transactions is counterbalanced by a corresponding gain or loss on the futures contract, and the hedger is merely provided with a substantial insurance against price fluctuations. There are similar hedging transactions by millers who sell flour in advance of their accumulation of the required amount of wheat to be ground.

[14] This is because the futures contract merely requires delivery of grain of a certain grade, regardless of its origin, and the dealer making the delivery naturally surrenders for its outbound movement inbound billing calling for the highest basis of outbound charge, which is the proportional rate, and reserves to himself for his own outbound shipments the more favorable inbound billing calling for the application of transit balances.

ingly affects the directly related cash price, which is the price paid to the producer.

EFFECT OF TRANSIT BALANCE ON FUTURES MARKET

The foregoing situation is particularly emphasized by Kansas City, which operates to a large extent on transit balances, and which is apprehensive that the discrimination in favor of the outbound shippers under transit balances, and against the outbound shippers of grain delivered under futures contracts, at the higher proportional rates, may eventually reach the point of preventing deliveries on futures contracts, and drive the professional trader and the hedger out of the Kansas City market, and thereby eliminate Kansas City as a futures market. It is said that Kansas City's price would then be merely the Chicago price minus the freight rate from Kansas City to Chicago, whereas today, by reason of the location of Kansas City closer than Chicago to much of the grain-producing territory, and by reason also of the greater demand for grain at Kansas City than at Chicago from the Southwest and certain other localities, the futures price at Kansas City is higher than the Chicago price minus the freight rate from Kansas City to Chicago, and is therefore relatively higher than the price at Chicago.[15]

EFFECT OF FUTURES MARKET ON CASH PRICE

Some of the foregoing statements of the primary markets concerning the operation of the futures markets have been challenged of record. It is unnecessary to attempt to resolve these differences. The issue here as to the rate break goes beyond the status of any primary market as a futures market. It may perhaps be taken as established, however, that the practice of hedging, in view of the present operations of the futures market, does tend to keep to a minimum the difference between the purchase and sale prices of grain, to the benefit of both producer and consumer. In other words, in the absence of the substantial measure of insurance against price fluctuations now afforded by hedging, the margin between the purchase price of the grain at the country station and its ultimate sale price by the grain dealer to the consumer would have to be sub-

[15] The term "futures trader" as used in the foregoing discussion refers primarily to the futures trader commonly known as the speculator, who ranges from the big operator who attempts to corner the market, to the ordinary citizen, who also thinks he can outguess the market in his more modest operations. The term "speculator" is not used in the text, because many of the futures sales and purchases are hedging transactions of the cash-grain dealers as an insurance against speculation, though it is not intended to say that hedgers do not also at times speculate. The speculator is said to be a necessity of the futures market in swelling the volume of grain trading to the point of ability to absorb the hedging transactions and give so-called liquidity to the market.

stantially increased, doubtless at the expense of the producer, in a lower price offered at the country station.

RATE TO FIRST MARKET APPARENTLY MOST IMPORTANT TO PRODUCER

The producer's country price is generally said to be the market cash price minus the freight and handling charges into the market. On such a basis it follows that a reduction in the inbound rate to the market would benefit the producer, if the market price remained stationary. Whether that price would be affected by a widespread reduction of inbound rates is a matter of some speculation. The weight of the evidence seems to be that the market price would perhaps be more affected by a change in the outbound than in the inbound rate. The effect upon the producer of any change in rates is more or less speculative, but the record seems clearly to indicate that any substantial benefit to the producer would more likely come from a reduction in the inbound rate than from any other revision.

RATE BREAK PRESERVES CARRIERS' REVENUES

It is believed that making rates through primary markets exclusively by combination of flat rates to and proportional rates from the markets, would not only preserve, but would substantially increase, carriers' revenues, even with substantial reductions in both the inbound flat rates and the outbound proportionals, because of the discontinuance of transit balances much lower than the proportionals. This statement may be challenged as resting on the false premise of no change in the present channels of movement. But there is a certain amount of grain to be moved through the primary markets, and it seems reasonably clear that the advantages and disadvantages of a changed current of traffic would be rather well equalized between markets, carriers, and shippers. Such a change might be of decided advantage to originating lines in many instances. For example, grain now carried by the North Western to Omaha, thence by the Missouri Pacific to Kansas City and the Santa Fe beyond, with transit at Kansas City under the proportional rate from Omaha, would more likely be retained to the North Western's own rails for further carriage from Omaha to Chicago under a strict application of the rate break and the resulting higher charge over the route through Kansas City than from Omaha direct. Similarly, grain now carried by the Santa Fe to Kansas City, thence by the Missouri Pacific to Omaha and the North Western to Chicago, with transit at Omaha under the proportional rate from Kansas City, would more likely be retained to the Santa Fe for further transportation from Kansas City to Chicago under the same strict application

of the rate break [16] and the resulting higher charge over the route through Omaha than from Kansas City direct.

AS TO PROPRIETY OF BOTH PROPORTIONAL RATES AND TRANSIT BALANCES

The propriety of the present dual system of proportional rates and transit balances from the markets is open to question from the standpoint of orderly tariff procedure. It may be argued that the transit balance as well as the proportional rate is specifically provided for by tariff. But we are charged with the proper regulation of the construction of tariffs, and with the prevention of abuses in tariff administration, as well as with the prevention of undue preferences between outbound shippers. We clearly are empowered to say whether, in all the circumstances affecting the grain traffic, proportional rates shall be employed exclusively, or in part, or at all.

TRANSIT BALANCE AT PRIMARY MARKETS A DISORGANIZER OF RATES

The transit balance at primary markets has always been a source of disorganization of rates. [17] It gave rise to the proportional rate, as a result of carriers from the markets, not parties to the overhead rate, publishing the transit balance as a proportional rate. Certain of the carriers to-day publish what are known as varying proportional rates, restricted to apply only on grain from specified territories from which there are overhead through rates in which they do not participate. There are requests upon this record for the translation of some of the existing transit balances into open proportional rates. Just so long as transit balances remain a substantial factor in the adjustment of rates from the primary markets, just so long will there be undue preferences between outbound shippers, as well as general instability in rates resulting from shippers seeking the

[16] Proportional rates are 17.5 cents from Omaha to Chicago, 8 cents from Omaha to Kansas City, and 17.5 cents from Kansas City to Chicago. Under present transit regulations a shipment from Omaha to Chicago can be stopped for remerchandising or milling at Kansas City upon payment of 8 cents inbound and a transit balance of 9.5 cents outbound (as already explained in footnote 10), in lieu of the rate-break combination of 8 cents plus 17.5 cents.

[17] In *Matter of Alleged Unlawful Rates and Practices*, 6 *I. C. C.* 205, we declared transit balances inapplicable on shipments billed locally to the primary market. In *Re Rates and Practices of M. & O. R. Co.*, 9 I. C. C. 373, we questioned the propriety of, but did not condemn, the proportional rate, published separately as such. In *In Re Substitution of Tonnage at Transit Points*, 18 I. C. C. 280, we characterized the application of a separately published rate on shipments "from beyond" as "still open to some legal objection," but "so much in advance of the transit privileges general throughout the country that it may well be accepted as a model for traffic managers desirous of remedying chaotic and unlawful practices upon their lines. The Commission is convinced that in no other way can transit to and from the large storage markets be arranged unless carriers are to take an impossible burden of policing and supervision and shippers be subjected to extremely annoying rules." In *Transit Cases*, 24 I. C. C. 340, we laid down certain general rules governing transit and recognized, inferentially, the lawfulness of both proportional rates and overhead rates with transit.

translation of transit balances into proportional rates. Prior to General Order No. 28 of the Director General of Railroads, already referred to, rates were generally on the combination basis, and there was a minimum of complaint against this method of rate adjustment. A return, as closely as practicable to that basis would go far toward eliminating much of the complaint that has arisen from time to time concerning the relation of rates through the various primary markets. The best interests not only of the primary markets, but of the producer, consumer, and carrier will be served by the fullest possible application of the rate-break combinations through primary markets.

APPLICATION OF PROPORTIONAL RATES REQUIRED FROM PRIMARY MARKETS

We find that the practice of contemporaneously charging both proportional rates and transit balances subjects the shipper under proportional rates to undue prejudice and disadvantage, and gives to the shipper under the lower transit balance an undue preference and advantage, from which the carriers will be required to cease and desist; that the through rates herein prescribed, on the basis of flat rates to the primary markets and proportional rates beyond, will be reasonable; and that overhead through rates less than those combinations should be canceled.

EXCEPTIONS TO PERMIT CARRIER COMPETITION

The foregoing finding is not intended to prevent carrier competition that does not disrupt the basis of making rates by combination on the primary markets. Thus the combination on a given market may be applied as a through rate through another market on which the combination is higher than on the market first mentioned, provided that the shipment is not stopped in transit at the market or other intermediate point on the route over which the higher combination obtains; but if the shipment is stopped at either the market or other intermediate point on the latter route, the higher combination must be applied. Similarly, a proportional rate from one market to another may be applied over a competitive route through a third market on which the combination is higher than over the direct route, provided the shipment is continuous, but the higher combination of proportional rates to and from the third market will be applied on shipments stopped there or at any other intermediate point for transit purposes on that route.

ADJUSTMENT TO MISSISSIPPI VALLEY AND SOUTHEAST

In connection with the general discussion of the rate break the adjustment of rates from Omaha, Kansas City, and St. Louis to the

Mississippi Valley locally and for the Southeast requires extended comment. From Omaha the proportional rate to Memphis is the combination on St. Louis, and the proportional rate to New Orleans is the combination on St. Louis and Memphis, but the proportional rate to either Memphis or New Orleans is not the combination on Kansas City. The rate from Kansas City is only 1 cent less than from Omaha to both Memphis and New Orleans, whereas if the rate from Omaha were the combination on Kansas City the rate from Kansas City would be lower than from Omaha by 8 cents on wheat and 7 cents on coarse grains, the proportional rates from Omaha to Kansas City, just as the rates from St. Louis are less than from Omaha by 13.5 cents on wheat and 12 cents on coarse grains, the proportional rates from Omaha to St. Louis. Kansas City requests that the rates from Omaha be made on the Kansas City combination, and that the Mississippi Valley rates be revised in this way: On wheat publish as a reduced proportional rate from Memphis to New Orleans the transit balance from Memphis to New Orleans of the present overhead rate (less than the Kansas City combination) from Wichita to New Orleans; add the present proportional rates from St. Louis to Memphis and from Omaha to St. Louis to get the proportional rate from Omaha to New Orleans; subtract the present proportional rate from Omaha to Kansas City to make the proportional rates from Kansas City to Memphis and to New Orleans; and finally break the new proportional rate from Kansas City to New Orleans on Memphis; on coarse grains make the proportional rates between all of the above markets 90 per cent of the rates on wheat; then let the rates from west of the Missouri River and from other origin territories break on whichever market makes the lowest combination.

PROPOSED READJUSTMENT BASED PRIMARILY ON ALLEGED NECESSITY AS TO COARSE GRAINS

The contentions of Kansas City in support of its proposals are substantially as follows:

The proposed readjustment is requested mainly because of the situation as to coarse grains. The price of coarse grains at Kansas City is higher than at Omaha by the amount of the proportional rate of 7 cents from Omaha to Kansas City, which requires a rate outbound from Kansas City 7 cents less than from Omaha, if Kansas City is to compete with Omaha on coarse grains in the Mississippi Valley. The price at Kansas City is set on this basis because Kansas City finds it necessary each year to buy grain in the so-called north

Omaha area of northwestern Iowa, southern Minnesota, southern South Dakota, and northern Nebraska, from which the rate to Kansas City is the combination on Omaha. The Omaha combination from this territory is the highest inbound rate paid on any coarse grains into Kansas City and must be reflected in the price paid for all coarse grains received at Kansas City. Under the present adjustment of 1 cent from Kansas City less than from Omaha the Kansas City dealer is at a disadvantage of 6 cents in selling grain in the Mississippi Valley, if the shipments move on the proportional rate from Kansas City, and he therefore uses transit on the rate from Omaha. This requires shipments to originate at or to be routed through Omaha, and Kansas City can not procure sufficient grain under these conditions to satisfy her demands, either from the north Omaha area or from the important coarse-grain territory south of the Platte River in Nebraska. The proposed rates would be combinations on Omaha and Kansas City from the north Omaha area, and combinations on Kansas City from the south Platte area, and would require Omaha to transit on the inbound rate to Kansas City from the south Platte area. Kansas City is on the direct route from both the north Omaha area and the south Platte area, whereas Omaha is on the direct route only from the north Omaha area, and it is more reasonable to require Omaha to transit from the south Platte area than to require Kansas City to transit, as at present, from both the north Omaha area and the south Platte area.

DIFFERENT SITUATION AS TO WHEAT

The contentions of Kansas City as to wheat are substantially as follows:

The proposed rates on wheat are governed by southern Kansas, and not by the north Omaha area. The rates from southern Kansas to the Mississippi Valley are less than the combinations on Kansas City, and lower than from northern Kansas, and both Kansas City and St. Louis can reach the Mississippi Valley on wheat [18] only on transit balances of the southern Kansas rates, as already stated. These rates do not apply through Omaha, and Omaha is not an important competitor of Kansas City on wheat in the Mississippi Valley. St. Louis would be required to transit under the proposed proportional rate from Kansas City to Memphis, or on through rates from southern Kansas made on the Kansas City combination, instead of on through rates from southern Kansas, less than the combinations on Kansas City, as at present.

[18] This discussion includes flour, which moves at the wheat rates.

OBJECTIONS TO KANSAS CITY'S PROPOSAL

Both Omaha and St. Louis object to the proposal of Kansas City as giving a monoply to Kansas City on coarse grains from the south Platte area. They challenge the assertion of Kansas City that the price of corn is usually higher at Kansas City than at Omaha by the amount of the proportional rate of 7 cents from Omaha to Kansas City, though they apparently concede the accuracy of the assertion as to oats.

PROPORTIONAL RATE FROM OMAHA TO ST. LOUIS IS KEY TO SOUTH PLATTE SITUATION

The situation as to the Mississippi Valley presents exceptional difficulties, in view of the adjustment of rates from the south Platte area through Omaha to St. Louis. The present proportional rate of 13.5 cents from Omaha to St. Louis for 414 miles is also the proportional rate from Kansas City to St. Louis for 278 miles, and the rates from Nebraska to Omaha, by agreement of Omaha, Kansas City, and the carriers, are relatively higher than they would be if the rate from Omaha to St. Louis were on a basis better proportioned to the rate from Kansas City to St. Louis from the standpoint of relative distances. Chicago is contending that, by comparison with the rate of 17.5 cents from Omaha to Chicago, for 487 miles, the rate from Omaha to St. Louis, for 414 miles, should be increased, or the rate from Omaha to Chicago reduced. Omaha urges that if the rate from Omaha to St. Louis is to be increased the inbound rates from Nebraska to Omaha should be reduced, and that if the rates from Kansas City to the Mississippi Valley are to be made 8 cents on wheat and 7 cents on coarse grains less than from Omaha, the rates from Omaha to Minneapolis and Duluth should correspondingly be made 8 cents on wheat and 7 cents on coarse grains less than from Kansas City, in lieu of the present differences of 1 cent to Minneapolis and 1.5 cents to Duluth. Kansas City would differentiate the latter situation on the ground that the rates from the Missouri River to Minneapolis and Duluth are merely parts of through rates to the East over routes alternative with the direct routes through Chicago and St. Louis, and that the longer distances over those routes than over the direct routes are comparable with the longer distance from Omaha through St. Louis to the East than from Kansas City through St. Louis to the East.

RATES TO MEMPHIS FOR THE SOUTHEAST

What has been said about the Mississippi Valley applies equally to southeastern and Carolina territories, to which the rates are com-

binations on Memphis, except that the rates from St. Louis, Omaha, and Kansas City to Memphis for the Southeast are 2.5 cents less than to Memphis proper on wheat and coarse grains, due to *Rates to, from, and between Points South of Ohio River*, already referred to, increasing the proportional rate from 9 cents to 11.5 cents on both wheat and coarse grains from St. Louis to Memphis proper, but making no change in the rates from St. Louis to Memphis for the Southeast, which were not in issue. Kansas City's proposal is to continue this relative adjustment and to make the rates from Kansas City to Memphis for the Southeast correspondingly lower than from Kansas City to Memphis proper.[19]

The rates from St. Louis and points basing thereon to southeastern and Carolina territories are the same through Cairo as through Memphis, due to the rates from St. Louis being as much lower to Cairo than to Memphis as the rates from Cairo are higher than from Memphis. In other words, the rates from St. Louis to Memphis for the Southeast are 9 cents on both wheat and coarse grains, and from St. Louis to Cairo for the Southeast 3 cents on both wheat and coarse grains, the difference of 6 cents in favor of Cairo inbound offsetting a difference of 6 cents against Cairo outbound.

Omaha, Kansas City, and St. Louis are more interested in the differentials from Kansas City under Omaha to Memphis than to New Orleans, because Memphis is the main Mississippi Valley gateway to the important consuming territory of the Southeast.

RATE-BREAK COMBINATIONS TO THE MISSISSIPPI VALLEY

The short-line distance from Omaha to Memphis is 675 miles, and is through Kansas City, 196 miles south of Omaha. The route through St. Louis is about 40 miles longer. From a transportation standpoint the rates from Kansas City should be less than from Omaha by the amount of the proportionals from Omaha to Kansas City rather than by the present 1 cent. That is the adjustment from Kansas City to Texas and Louisiana (other than Mississippi River points). From the south Platte area to Arkansas the rates reflect the equivalent of that adjustment.[20] The rates from Omaha to Mem-

[19] The present proportionals on both wheat and coarse grains from St. Louis are 11.5 cents to Memphis proper and 9 cents to Memphis for the Southeast. The proposal of Kansas City is to make the rate on coarse grains 90 per cent of the rate on wheat to Memphis proper, the rate on wheat to Memphis for the Southeast 2.5 cents lower than on wheat to Memphis proper, and the rate on coarse grains to the Southeast the same as on wheat to the Southeast, that is, 11.5 cents on wheat and 10.5 cents on coarse grains to Memphis proper, and 9 cents on both wheat and coarse grains to Memphis for the Southeast.

[20] The proportional rates from Kansas City are less than from Omaha by 8 cents on wheat and 7 cents on coarse grains to Texas and Louisiana (other than Mississippi River points) and by 4.5 cents on wheat and 4 cents on coarse grains to Arkansas, but rates from the South Platte to Arkansas are so adjusted as to produce from Kansas City transit balances 8 cents on wheat and 7 cents on coarse grains less than the moving rates from Omaha.

phis and New Orleans should be combinations on Kansas City, and the rates from Kansas City to New Orleans should be combinations on Memphis. There is no justification for breaking the rates from Kansas City to Memphis and New Orleans on St. Louis. A difference of not to exceed 2 cents against St. Louis would be justified.

We find that the present relation of rates from Omaha and Kansas City to the Mississippi Valley, including Memphis and New Orleans, subjects Kansas City to undue prejudice and disadvantage, and gives to Omaha an undue preference and advantage, and that rates free from undue prejudice and disadvantage will be in accordance with the findings herein.

REVERSAL OF PREVIOUS FINDINGS

The foregoing findings as to the Mississippi Valley reverse our previous findings on the same general issue in three separate proceedings;[21] but the action here taken is justified by the broader showing of this record as to both inbound and outbound rates through the interested markets, and by the broader showing also as to the relation of this adjustment to the general adjustment of grain rates as a whole. In the last decision on the subject we recognized the inadequacy of the differential of 1 cent from Kansas City under Omaha to the Mississippi Valley, but denied the prayer of complainant for a wider differential largely because the through rates from the country points to final destinations were not in issue.[22] Nor was the effect of the adjustment upon the producer as fully developed in the other proceedings as it is upon this record.

RELATION OF WHEAT AND COARSE GRAINS

The foregoing discussion has been of the method of construction of rates through primary markets from which there are proportional rates. Before discussion of the general level of the flat rates to the primary markets and proportional rates between and beyond these markets, that compose the components of the rate-break combinations herein required, and of direct rates not made by market combinations, attention should be directed to the relation of rates on

[21] *Kansas City Transportation Bureau* v. *A. T. & S. F. Ry. Co.*, 16 I. C. C. 195; *Board of Trade of Kansas City* v. *St. L. & S. F. R. R. Co.*, 32 I. C. C. 297; *Kansas City Board of Trade* v. *A. & W. Ry. Co.*, 102 I. C. C. 285.

[22] "Having in mind the respective distances from Kansas City and Omaha to Memphis and other Mississippi River crossings and to many points in southern territory, it appears that a difference of 1 cent, Kansas City under Omaha, is insufficient and does not adequately reflect the difference in distance. But on the other hand complainant's contention is that the proportional rates from Kansas City should be a fixed difference of 7 cents under Omaha regardless of the total haul involved and regardless of the origin of the grain. We have repeatedly held that proportional rates are but factors of through rates and in many cases have declined to deal separately with one factor of a through rate where the through rate itself is not in issue."

wheat and coarse grains, and on grain and grain products, and to transit, as important factors of the readjustment to be hereinafter prescribed.

It has already been stated that present rates on coarse grains are the same as on wheat west of the Rocky Mountains and in Illinois, and 90 per cent of the rates on wheat in the plains States east of the Rocky Mountains, including the Southwest. It is clear that a point may be reached in reduced rates on wheat that would not justify a further reduction of 10 per cent in the rates on coarse grains. On the other hand, reduced wheat rates, if otherwise warranted, should not be withheld because of inability to preserve the 90 per cent relation on coarse grains. In *National Council Farmers Asso.* v. *Director General*, 56 I. C. C. 399, wheat and coarse grains were accorded the same rate. In *Grain, Grain Products And Hay*,[25] 64 I. C. C. 85, half of the increase permitted in *Increased Rates 1920* was removed and rates on coarse grains were reduced 10 per cent below the wheat rates, the reductions averaging about 13 per cent on wheat and 21.7 per cent on coarse grains. In the latter case the departure from the finding in the *National Council Farmers Asso. Case* as to the relation of rates on wheat and coarse grains was held justified on the ground of changed relation of values of wheat and coarse grains.

The importance of the coarse-grain relation to wheat is shown by the fact that for the years 1921–1925, inclusive, the coarse-grain proportion of total grain production was 90 per cent in South Dakota and Minnesota, 55 per cent in North Dakota, 86 per cent in Nebraska, and 60 per cent in Kansas. *Grain And Grain Products*, 122 I. C. C. 235, 282. The proportion of coarse-grain tonnage is also heavy in Iowa and Illinois. The proportion of the total grain traffic affected by the reduction of 21.7 per cent on coarse grains, referred to, was 70 per cent on the North Western, 60 per cent on the Burlington, 58 per cent on the Minneapolis & St. Louis, 55 per cent on the Milwaukee, 50 per cent on the Burlington, 27 per cent on the Santa Fe, 24 per cent on the Great Northern, and 20 per cent on the Northern Pacific. The carriers point out that the unfavorable financial showing among the carriers is most pronounced with the important coarse-grain carriers, whose rates were most affected by that reduction.

A comparison of operating results does suggest that the relatively low level of coarse-grain rates is at least partially responsible for the unfavorable financial showing of the coarse-grain carriers, especially in western-trunk-line territory. For instance, in a group of 21 car-

[25] On further hearing in that proceeding, 80 I. C. C. 263, the Mountain-Pacific group, and rates between the Mountain Pacific and western groups, were excepted from the finding that rates on coarse grains should be 90 per cent of the rates on wheat.

riers with combined annual freight revenues of approximately $2,000,000,000, 9 of them, with relatively low coarse-grain tonnage, exceeded their statutory return by nearly $35,000,000, while the other 12, with a large coarse-grain tonnage, were short of their statutory return by more than $75,000,000.

It has been suggested that the unfavorable showing of some of these carriers is the result of unduly increased maintenance charges. The figures of certain of these carriers do suggest maintenance charges that were at least liberal, and some that might be characterized as excessive, but the figures of the carriers in the western district as a whole do not demonstrate overmaintenance. As to some of the coarse-grain carriers they rather suggest undermaintenance. The ratio of maintenance charges to operating expenses of all carriers in the western district is slightly below the ratio for all Class I carriers in the United States. It exceeds the ratio of the Canadian National system by only a small amount. Comparison is made with the Canadian ratio because it may be assumed that the Canadian National, government owned and operated, would not be maintained beyond the point of maximum economy and efficiency.

From a transportation standpoint there is no justification for rates on coarse grains 10 per cent lower than on wheat. Coarse grains load lighter than wheat. Perhaps the main argument in favor of the differential is the somewhat lower value. Substantial justice can best be done to shippers of both wheat and coarse grains by one rate on both classes of traffic. In this way wheat rates can be reduced to a level justified by the showing of this record as to wheat, and border-line discriminations between States can be best removed.

We find that the rates on wheat and coarse grains are unreasonable to the extent they exceed the rates prescribed in Appendix D, to be later referred to.

RELATION OF RATES ON GRAIN AND GRAIN PRODUCTS

The rate on flour is the same as on wheat except that between certain parts of the Mountain-Pacific group, and from east of the Rocky Mountains to Pacific coast territory, the flour rates are 7 cents higher than on wheat. From the standpoint of relative loadings, values and general transportation characteristics the propriety of this equalization might be questionable. Arguments in favor of the adjustment are that it conduces to shorter hauls on wheat and the prompt return of empty cars, provides additional wheat storage at mills near the wheat fields, promotes the prosperity of the smaller country towns, supplies offal to the farms, and stimulates country prices through the millers' competitive buying, frequently at premium prices. One of the arguments most emphasized is that a flour

differential would tend eventually to move the milling industry to the more populous sections of the East. The carriers which now transport wheat and flour at the same rate are not proposing a differential for flour.[24]

The rates on the direct products of coarse grains are usually the same as on the coarse grains from which the products are made. The charging in some instances of coarse-grain rates on bran, shorts and middlings, the by-products of wheat milled in transit, will have separate consideration later.

We find that the rates on wheat and coarse grains and their products are unreasonable to the extent they exceed the rates prescribed in Appendix D.

TRANSIT

Transit is a common practice at both market and interior milling points. It is accorded in connection with both flat and proportional rates, over both direct and indirect routes, frequently with extensive back-haul and out-of-line service[25] and, except in the Northwest (to be discussed later), without charge other than the compensation included in the line-haul rate. The transit stop is for a variety of purposes, including inspection, conditioning, storing, milling, feed mixing, and partial unloading. There is no general rule or practice governing the purpose or number of such stops, each carrier dealing with requests for transit according to the facts in each case. Sometimes successive stops are permitted by each carrier in a through route. Present transit practices are accordingly far from uniform, and are the subject of wide complaint of discrimination upon this record.

Some contend that transit rules and practices should attain some reasonable approach to uniformity throughout the entire western district and propose rules governing some of the phases of transit. Others urge that no general rule would be practicable, and that the discretion of the carrier should continue to control individual situations. Still others urge the assessment of a separate charge for the users of transit and a consequent lifting of the alleged burden of higher rate level that transit occasions.

---

[24] Flour mills in California and grain and milling interests in Texas favor a flour differential. Some California flour mills would increase it. The largest flour mill in California and the southwestern millers oppose a differential. California is a deficit wheat State, and the equality of wheat and flour rates, according to the proponents of the differential, tends to render less profitable the milling of wheat in California, and to deprive the California millers of the only distributing territory reasonably available to them, which is in California.

[25] By back haul is meant a diversion from the direct route of shipment to a transit point and back to the point of diversion for continuation over the direct route; by out-of-line haul a diversion from the direct route to a transit point and back to the direct route at a point other than the point of diversion; and by circuitous route a route considerably longer than the direct route.

The situation is a difficult one, especially from the standpoint of carrier competition.[26] In some instances the practices indulged are plainly unwarranted.[27] A strict rule governing all phases of transit will not be undertaken at this time, but some limitations are here deemed necessary. The carriers transit rules should provide for (*a*) a maximum of two free stops in transit (plus one inspection) of grain for storage, conditioning, and milling into its direct products, additional stops to be paid for at the rate of 2 cents per hundred pounds for each stop other than for inspection; (*b*) reasonable limitation of out-of-line and competitive routes and back hauls; and (*c*) elimination of little-used and obsolete transit provisions that serve mainly as a basis for unreasonable requests for transit and to bring censure upon transit tariffs generally. A stop at a primary market from which there are proportional rates will be viewed as any other transit stop.

We find that present transit practices are unreasonable and unduly preferential and prejudicial to the extent they are not in harmony with the foregoing conclusions.

SEPARATE TRANSIT CHARGE IN NORTHWEST

The foregoing discussion has been of transit without separate charge, which prevails throughout the western district, except that on the lines of the Northern Pacific, Great Northern, Milwaukee west of about Mobridge, S. Dak., and Oregon-Washington Railroad & Navigation Company west of Huntington, Oreg., to Minneapolis and Duluth eastbound, and to north Pacific coast terminals westbound, a separate transit charge of from 1.5 to 2.5 cents is made. The charge here is apparently made because largely of a minimum of cross-country competition of north-and-south lines and a desire to encourage the movement of wheat rather than of flour.

We find that the making of a separate charge for transit on the northern lines named, or parts of those lines, and the granting of transit without separate charge on other lines in the western dis-

[26] The Chicago & North Western grants transit not only at intermediate points on its direct route from Minneapolis to Chicago, but over its indirect route through Cedar Rapids, Iowa, to meet the competition of the direct route of the Rock Island through Cedar Rapids. The distances are 420 miles over the direct route of the North Western, 540 over the direct route of the Rock Island, and 560 miles over the indirect route of the North Western through Cedar Rapids. The Missouri Pacific applies its direct-line rate from Wichita to New Orleans over its circuitous route through Kansas City, in order to attract the outbound movement from Kansas City to the Gulf and away from the lines operating from Kansas City to Chicago. The distances are approximately 850 miles direct and 1,075 miles through Kansas City.

[27] The record describes 30 cars of grain kept in transit in Texas for 100 days, transported 1,500 miles, and finally delivered at a point 300 miles from original shipping point, the peregrinations of these cars including a virtual shuttle service between Dallas and Fort Worth, to try those markets.

trict, or on other parts of the northern lines, subjects the shippers subject to the separate charge to undue prejudice and disadvantage and gives to the shippers against whom no separate charge is made an undue preference and advantage, from which the northern lines should cease and desist by making no separate charge for transit.

AS TO PUBLICATION OF TRANSIT RULES

Many of the present transit circulars violate the provisions of Tariff Circular 20, and are confusing, because they publish rates in connection with transit provisions.[28] They should be confined to transit rules and leave the rates to be published in rate tariffs.

BRAN, SHORTS, AND MIDDLINGS

These commodities are by-products of milled wheat. On wheat milled in transit the basis of through charge varies. In some instances it is the through rate on wheat from the origin of the wheat to the final destination of the product on both the wheat and flour and the by-products to and from the milling point. In other instances it is the through rate on corn on the weight of the by-products and the through rate on wheat [29] on the remainder. In the latter instance the justification offered is the lower value of the by-products than of the wheat, and their competition with corn as feed, or as an ingredient of prepared stock and poultry feeds.

Transit contemplates a thorough shipment at the through rate on the commodity offered for shipment and, if strictly enforced, would require through billing at that rate.[30] In that event the application of the wheat rate beyond the milling point would not be open to question. For many years there has been a departure from the practice of through billing, partly because of the frequent uncertainty as to final destination of the milled products, and partly,

---

[28] Milwaukee I. C. C. B-5073, item 2360, names rates from the Missouri River to Chicago and Milwaukee, and provides that the rate will be 16.5 cents higher than the proportional rate to Minneapolis when transited at Webster, S. Dak. North Western I. C. C. 9946, item 445, provides for the addition of 7.5 cents to rates to Green Bay, Wis., subject to rule 6, on shipments from west of the line from Iroquois, S. Dak., to Oakes, N. Dak., to Marinette, Wis., transited at Carroll and other Iowa points, and at Volin and Yankton, S. Dak.

[29] Or flour; sometimes the through rate on flour, when higher than on wheat, is applied.

[30] "Storage in transit and other transit arrangements rest upon the fiction that the incoming and outgoing transportation services, while distinct, are applied to a continuous shipment from point of origin to point of destination. *Central R. R. Co. of N. J. v. United States*, 257 U. S. 247, decided December 5, 1921. We said in *In re Milling-in-Transit Rates*, 17 I. C. C. 113: 'Why should there be a milling-in-transit point if there is not through transportation? And if there is through transportation, the through rate from point of origin must apply. "Transit" implies a through movement.'" *Kansas City Board of Trade v. A., T. & S. F. Ry. Co.*, 66 I. C. C. 185, 189.

doubtless, because of the opportunity afforded (by the substituted practice of original inbound billing at the flat rate to the milling point) for selection of the lowest outbound transit balance. The application on wheat milled in transit of other than the wheat rate on the outbound shipments from the milling point results not only in a violation of the true principle underlying legitimate transit, but in discriminations and rate confusion and disorganization as well. This adjustment requires no further discussion, inasmuch as the one rate herein prescribed for wheat and coarse grains will apply on bran, shorts, and middlings from the transit point.

TRANSIT ON MIXED FEEDS

It is a common practice to apply the proportional rate or transit balance on the by-products of grain when shipped out of the market or transit point as one of the ingredients of mixed feeds containing other than the direct products of grain. In *The Transit Case*, 18 I. C. C. 280, 292, the propriety of transit regulations on such mixed feeds was questioned. In *Memphis Grain & Hay Asso.* v. *St. L.-S. F. R. R. Co.*, 24 I. C. C. 617, the transit was withheld on mixed feed containing more than 20 per cent of nontransit commodities. By-products of grain mixed with other articles into prepared feeds become part of a new commodity not contemplated under a true conception of transit on grain. The rate from the point of manufacture, whatever the level in comparison with the rate on grain, should be a flat rate, not dependent on the inbound rate on grain.

We find that, in connection with the manufacture of mixed feeds containing other than the direct products of grain, the protection of the through rates on grain or grain products, with the resulting application on the mixed feed from the manufacturing point of the transit balances or proportional rates applicable on grain or grain products is unreasonable and unlawful.

THE UNIT RULE

Under this rule, in the absence of a separate rate on mixed feeds, the rate on any transit article in the mixture, however small its proportion of the total weight, upon surrender of inbound billing for that commodity equivalent to the total weight of the transit articles in the mixture, becomes applicable on the entire weight of the transit articles in the mixture, and inbound billing on the other transit articles in the mixture may be surrendered in connection with later outbound shipments. The theory is that, over a period of time, inbound billing will have been surrendered on the respective weights

of all the transit articles in the mixture, and a retroactive effect given to the surrender requirement. But there is no requirement of subsequent outbound shipment to the destination, or over the route, of the original outbound shipment, a necessary requirement in the proper linking up of the inbound and outbound shipments contemplated by legitimate transit. Nor is it proper to make outbound shipments upon deferred surrender of inbound billing. Other objections to the unit rule need not be discussed.

We find that the unit rule is unreasonable and unduly preferential and prejudicial.

STORAGE IN TRANSIT

Storage in transit of manufactured products of grain, which leave point of origin or intermediate transit point as manufactured products, for concentration at the storage point into outbound shipments, in straight or mixed carloads, and not for further processing, transcends the legitimate function of transit. This observation extends to the practice of forwarding nontransit less-than-carload shipments at carload rates as parts of mixed-carload shipments from transit points.

We find that storage in transit of the kind described is unreasonable and unduly preferential and prejudicial.

VARYING PRESENT RATE LEVELS

Consideration will now be given to the level of rates as differentiated from the method of their construction, and in the light of the foregoing findings as to commodity relations, transit, etc. Domestic rates will first be discussed.

The average general level of the present rates on grain and grain products to and through the primary markets, and between points not made on the market combinations, differs not only in general territories, but in different localities in the same general territory, as will be seen by using, as a convenient yardstick, the scale prescribed in *Oklahoma Millers' League* v. *A. & M. R. R. Co.*, 128 I. C. C. 523, for application on wheat and flour from Oklahoma to Louisiana (Docket No. 15026):[31]

[31] This scale was made on wheat 20 per cent and on coarse grain 17.5 per cent of the southwestern first-class rates, distances to be measured by the shortest possible routes for carload traffic without transfer of lading. It was regarded, in view of the method of fixing distances, as the substantial equivalent of the scale prescribed in *Oklahoma Corporation Commission* v. *A. & S. Ry. Co.*, 101 I. C. C. 116 (Docket 12244) for application from Oklahoma to Texas.

To—	Percentage of 15026 scale
To Chicago from—	
Central Illinois	57
Iowa	70.6
Wisconsin	67
Idaho	103.5
Oklahoma	84
Panhandle of Texas	98
Montana	90
Nebraska	86.5
Minnesota	68.5
Kansas	83
North Dakota	75.5
Eastern South Dakota [1]	83
Colorado	95
To Milwaukee from—	
Wisconsin	69
Eastern South Dakota [1]	83
To St. Louis from—	
Idaho	107.5
Oklahoma	89
Panhandle of Texas	100
Western Missouri	74
Southeastern Missouri (to St. Louis and Memphis)	85
Nebraska	81
Iowa	71
Kansas	85.5
Central Illinois	57
Colorado	99
To Cairo from—	
Central Illinois	58
Southeastern Missouri	95
To Minneapolis from—	
Idaho	110
Oklahoma	83.5
Panhandle of Texas	100
Montana [2]	82
Iowa	74
Minnesota	63
Wisconsin	73
North Dakota [2]	66
Eastern South Dakota	75
Colorado	101
Minnesota scale up to 400 miles	63
To Duluth from—	
Montana [2]	82
Iowa	78
Minnesota	70
Wisconsin	74
North Dakota	66
Eastern South Dakota	78

To—	Percentage of 15026 scale
To Kansas City from—	
Idaho	94
Oklahoma	88.5
Panhandle of Texas	93
Western Missouri	73
Nebraska	78
Iowa	72.7
Minnesota	74.5
Kansas	68.5
Eastern South Dakota	94
Colorado	87
To Omaha from—	
Idaho	94
Nebraska	86
Iowa	74
Minnesota	80
Eastern South Dakota	88
Colorado	87
To Sioux City from—	
Minnesota	82.5
Eastern South Dakota	90
To Des Moines from—	
Iowa	74
To Memphis from—	
Idaho	102
Oklahoma	83
Panhandle of Texas	89.5
Central Illinois	65.7
Colorado	99
To Galveston from—	
Idaho	111
Oklahoma	91
Panhandle of Texas	82
Kansas	110
Colorado	115
To Dallas from—	
Idaho	116
To Oklahoma from—	
Colorado	112.5
Idaho	108.5
To New Orleans from—	
Idaho	108
Oklahoma	100
Panhandle of Texas	92.5
Kansas	78
Central Illinois	81.5
Colorado	110
To Fort Smith from—	
Idaho	100
To Little Rock from—	
Idaho	102
Iowa	101

[1] Chicago and Milwaukee. [2] Minneapolis and Duluth. [3] Plus transit.

	Percentage of 15026 scale
To Little Rock from—Contd.	
Central Illinois (average to State of Arkansas)	92
Colorado (average to Little Rock, Fort Smith, Texarkana)	89
To Shreveport from—	
Idaho	111
Iowa	114
Central Illinois (average to Louisiana Group 1)	94
To Alexandria from—	
Iowa	99
Eastern South Dakota	118
Nebraska to (Arkansas, Louisiana, Oklahoma, Texas)	115
To Seattle from—	
Idaho	100
Montana	84
Washington, northeastern Oregon, northern Idaho	75
South of Snake River in Columbia Basin [5]	75
North of Snake River in Columbia Basin [5]	80
To Oregon-Washington from—	
Colorado	98
To Portland from—	
Idaho	100
Washington, northeastern Oregon, northern Idaho	81.7
Oregon main-line points on O. W. R. & N.	81.5
Oregon branch-line points on O. W. R. & N., intrastate	94.5
Oregon branch-line points on O. W. R. & N., interstate	108
Local points on C., M., St. P. & P. in Washington	100
Local points on G. N. in Washington	85
To Arizona from—	
Idaho	109.5
Colorado	124.5
To New Mexico from—	
Colorado	149
To California from—	
Idaho	106.5
Colorado	98
To El Paso from—	
Idaho	136.5
Colorado	125

In connection with the foregoing table it will be borne in mind that, as already stated, the rates on coarse grains are the same as on wheat west of the Rocky Mountains, in Illinois, and in the territory east of the Mississippi River and the Great Lakes, and 90 per cent of the rates on wheat in the plains States east of the Rocky Mountains, including the Southwest.

It will be noted that by comparison with the 15026 scale many of the present rates are low, others are high, and relative rate levels are not in entire accord with transportation conditions. Among the influences contributing to these variations are Canadian competition, State regulation, and our own revisions in certain territories. We are confronted with the fact that, judged by the usual standards of transportation conditions, some of the rates in the western district, on both wheat and coarse grains, are too low, while others are too high. Horizontal treatment of such rates would perpetuate these inconsistencies. It follows that proper treatment would leave some of the rates as they are, reduce some, and increase others.

[5] Average to Seattle and Portland.

CARRIERS' PROPOSALS

Other than in the Northwest, in connection with *Grain and Grain Products*, 122 I. C. C. 235 (I. and S. Docket 2469), consolidated for further consideration herein, and in the Southwest, the carriers, generally speaking, especially in western trunk-line territory, point to the fact that the present rates have been largely prescribed or reviewed by us, contend that they are reasonable or subnormal, and propose no change in the present adjustment. The proposals of the northwestern carriers in the case cited are fully discussed in the report. The southwestern carriers make certain proposals. The general basis of these proposals is the scale prescribed for application from Oklahoma to Texas in the first decision in *Oklahoma Corporation Commission* v. *A. & S. Ry. Co.*, *supra*, which was substantially higher than the scale prescribed between the same points in the second decision therein. The original scale was the basis of a general voluntary downward revision of rates by the southwestern carriers, effective February 1, 1927, from Iowa, Illinois, Kansas, Missouri, Minnesota, and South Dakota to Texas and Louisiana, reflecting largely the combinations on Missouri and Mississippi River markets, from which the proportional rates to Texas and Louisiana were therein reduced. Their proposals in this proceeding include substantially increased rates from Colorado and Kansas to the Missouri River markets, offer no workable relation between the rates from the country points direct and through the Missouri River markets to the Gulf, and do not eliminate the transit balance beyond the primary markets. The southwestern carriers urge that neither the scale prescribed in the second of the above cases nor in the *Oklahoma Millers' League case*, *supra*, in view of transportation conditions obtaining in the Southwest, including extensive transit services, is high enough for application in that territory.

READJUSTMENT OF RATES MADE

A readjustment of rates throughout the western district has been evolved, for application on both wheat and coarse grains and the direct products thereof, subject to the transit regulations and other requirements of the previous discussion herein.

REASONABLE THROUGH RATE FIRST DETERMINED, THEN BROKEN BACK INTO RATE-BREAK COMPONENTS

To meet the contention, already mentioned, that through rates made on the primary-market combinations are necessarily unreason-

able, because of the manner of their construction, the rates herein prescribed have first been determined on a reasonable basis and, when applicable through primary markets from which there are proportional rates, broken back into flat rates to the primary markets and proportional rates beyond. The new proportional rates are better proportioned to the inbound flat rates than under the present adjustment, and they approximate, in a general way, the average transit balances beyond the first primary markets of the through rates prescribed in Appendix D.

We find that the present rates on wheat and coarse grains and their products are unreasonable and unduly preferential and prejudicial to the extent they exceed the rates prescribed in Appendix D, to be applied in accordance with the previous discussion herein as to rate break, relation of commodities, transit, etc., and subject to the later discussion herein of general issues or specific adjustments.

We further find that rates from other points to the same destinations are unreasonable to the extent they exceed rates made with reasonable relation to the rates from neighboring key points herein specifically prescribed.

We further find that rates between points between which rates have not been prescribed, specifically or by reasonable relation, are unreasonable to the extent they exceed rates made on the basis of the so-called interior scales shown in Appendix D.

Reasonable groupings of origin and destination points will be permitted.

FINDINGS UNDER INTERSTATE COMMERCE ACT

The Supreme Court of the United States recently interpreted the Hoch-Smith resolution as setting up no standard of reasonableness of rate level or relation other than that already provided by the interstate commerce act. *Ann Arbor Railroad Company* v. *United States*, — U. S., —, decided June 2, 1930. The findings herein are under the provisions of the interstate commerce act.

MILEAGE RATES THROUGH MARKETS A POSSIBILITY.

Pronounced changes in market relations will result from the foregoing findings. The original basis of overhead through rates with transit at the primary markets proved unsatisfactory and gave rise to the proportional rates. The proportionals were quite generally observed prior to the general percentage changes and were productive of much less complaint than the present proportional rates and transit balances, which do not function together harmoniously. A

return to the method, strictly observed, of making through rates by combinations on the primary markets is warranted by this record, in the interest of market, carrier, and producer. If it should fail, a uniform mileage basis through the markets, with transit balances exclusively beyond the markets, is a possible alternative.[32]

PROTECTION OF INTERMEDIATE FLAT RATES UNDER THE RATE BREAK

In checking in the proportional rates care should be taken to protect adjustments of flat rates, and rate relations, by appropriate requirements as to the inbound flat rate that can be used in connection with the proportional. Such a provision would prevent, to the Texas gulf ports, for example, combinations on Kansas City from Kansas points close in to Kansas City on a basis too low by comparison with direct rates from other points in Kansas, and from Oklahoma. Such combinations should in no instance be less than the flat rates herein prescribed from Kansas City.

SOME GENERAL RESULTS OF THE REVISION

It is impracticable and unnecessary to set out in detail the territories of origin and destination between which the primary-market combinations of flat rates in and proportional rates out will apply. It is sufficient to say that this will be the exclusive basis of charge from the grain producing territories both west and east of the Missouri River to the East, the Southeast, the Mississippi Valley, and the Southwest, and not merely a basis alternative with the lower overhead rate and transit balance, as it is to-day. However, certain origin territories from which the routes through primary markets are sufficiently direct to warrant prescription of the market combinations as the exclusive basis of charge should be specifically described:

1. To Chicago the rates will be combinations on Minneapolis from on and north of the line of the Chicago & North Western west from Mankato, Minn., to Pierre, S. Dak. That adjustment was prescribed in *Rates on Grain and Grain Products*, 56 I. C. C. 133, 689, but has been departed from to some extent.

[32] "This proceeding is additional evidence 'that there has never been an adjustment that was satisfactory to the rival markets.' Perhaps only a uniform mileage scale would preclude claims of relative maladjustment, and while no market desires this system to be here applied or applied generally, eventual resort to this basis may possibly be the only outcome of reiterated complaint over a complex situation which we have repeatedly tried to adjust." *Minneapolis Traffic Asso. v. C., M. & St. P. Ry. Co.*, 46 I. C. C. 685, 692.

2. To Duluth the rates will be combinations on Minneapolis from on and south of the line of the Great Northern west from Minneapolis through Willmar and Yarmouth, Minn., to Forbes, N. Dak., including points on the main line of the Milwaukee west from Minneapolis through Appleton, Minn, and Aberdeen, S. Dak., to and including Montline, N. Dak. In *Rates on Grain and Grain Products, supra*, the rates to Duluth were made combinations on Minneapolis from points south of Mankato-to-Pierre line above described, except from points on the Great Northern, from which the route is through Willmar rather than through Minneapolis. Under the findings herein the rates from points on that line within the origin territory described will be the combinations on Minneapolis, whether the shipments are routed through Minneapolis or through Willmar.

3. To Chicago and St. Louis the rates will be combinations on Kansas City from on and west of the line of the Santa Fe south from Arkansas City through Oklahoma City to Fort Worth. The present rates from this territory are lower than the combinations in many instances.

4. The rates to Groups 1, 2, and 3 in Texas and Louisiana, to Arkansas, and to the Mississippi Valley, will be combinations on Kansas City from Colorado and from Kansas on and north of the line of the Santa Fe west from Kansas City through Emporia to Hutchinson, and the Rock Island thence to Liberal. From Kansas south of that line the rates will be a maximum of 3 cents less than the Kansas City combination. The present rates to these destinations are generally much less than the combinations on Kansas City from southern Kansas, and are in some instances on that combination and in others less than the combination from northern Kansas, from Nebraska and from Colorado. In *Southern Kansas Grain Asso.* v. *C. R. I. & P. Ry. Co.*, 139 I. C. C., 641, transit at Kansas City under the export rates to Texas, Louisiana, Arkansas, and the Gulf ports was restricted to points of origin on and north of the line of the Santa Fe west from Kansas City through Florence, Newton, Hutchinson, Kinsley, Dodge City, and Garden City, Kans.

Kansas will be regrouped to some extent. Except for a few points in extreme northwestern and southwestern Kansas the rates to Kansas City apply from four groups extending from the northern to the southern border of the State. These groups are here rearranged into six groups also extending from the northern to the southern border of the State. The present and proposed groups and rates to Kansas City, grading up westward across the State, are as follows:

Present rate	Proposed	
	Rate	Note
	Cents	
18 cents	18	Same as present 18-cent group.
19 cents	19	Same as present 19-cent group.
19.5 cents	19.5	Same as present 19.5-cent group.
20 cents	18.5	Embraces present 20-cent group and the 20.5-cent group west to but not including Liberal, Garden City, Scott, Oakley, and Colby.
20.5 cents	20	Embraces additional part of present 20.5-cent group west to but not including Goodland, Wallace, Selkirk, and Syracuse.
Do	22	Embraces the remainder of the present 20.5-cent group to the Colorado Border. Cedar Bluff, Montezuma, and Sublite will be in the 19-cent group; Atwood, Santa Fe, Moses, and Hugoton in the 21-cent group; and Bird, St. Francis, Johnson, Rolla, and Elkhart in the 22-cent group.

On shipments to the East, Southwest, and Mississippi Valley rates from Colorado common points will be combinations on the Missouri River markets, and rates from Utah and Idaho will be the differentials over Colorado common points prescribed in *Ogden Grain Exchange* v. *A. & S. R. R. Co.*, 122 I. C. C. 691, Docket No. 16112.

In *Oklahoma Corporation Commission* v. *A. & S. Ry. Co.*, *supra* (Docket No. 12244) a distance scale of rates was prescribed from Oklahoma to Texas on a basis substantially lower than the rates previously in effect. The difference between the rates from Kansas and Oklahoma to Texas, then small, was considerably widened. This resulted in marked discriminations against Kansas, especially at border points, the undue character of which is generally conceded, and of which Kansas has complained. Oklahoma has also complained of an alleged undue preference of Texas in rates to Texas. The prescribed rates will place Kansas, Oklahoma, and Texas on the same general basis to Texas and the Southwest generally.

Texas and Louisiana Groups 1, 2, and 3, except on shipments intrastate in Texas, may be defined roughly as shown below. Except from Texas to Louisiana these are the groups proposed by the carriers and agreed to quite generally by the parties:

Group 1 in Texas.—East from Quanah through Dennison to Texarkana and the State line, south to Waskom, and west and north through Longview Junction, Kaufman, Alvarado, and Mineral Wells, to but not including Memphis.

Group 2 in Texas.—South of Group 1 and on the west extending south to include Girard and Big Springs, thence southeast and east through San Angelo, Temple, Hearne, Palestine, and San Augustine to the State line.

Group 3 in Texas.—South from San Angelo to and including San Antonio, thence east through Flatonia to include Galveston and Houston to the Louisiana State line.

The small Group 4, south of Group 3, proposed by the carriers, should be included in Group 3.

Louisiana Group 1.—Immediately east of Texas Group 1 from the Arkansas-Texas line east to the Mississippi River, and south of the Vicksburg, Shreveport & Pacific to include Shreveport, Monroe, and Tallulah.

Louisiana Group 2.—Immediately east of Texas Group 2 to the Mississippi River and south to include the line of the Texas & Pacific, including Natchidoches and Alexandria.

Louisiana Group 3.—The remainder of the State south of Group 2.

In both Texas and Louisiana Group 1 rates will be 5 cents, and Group 2 rates 2.5 cents, under Group 3.

Group 3, on shipments from Texas, will be the same as Group 3 on shipments from other origins. Groups 1 and 2 on shipments from Texas will comprise the same aggregate territory as Groups 1 and 2 on shipments from other origins, but Groups 1 and 2 on shipments from Texas will be divided by a line drawn from north to south just east of Paris, Corsicana, Waco, and Temple (in Group 1) instead of by the east-to-west line that will separate Groups 1 and 2 on shipments from other origins.

Generally speaking, there will be a constant transit balance between destinations in Texas, in Louisiana, and in Arkansas from all gateways and other origins. For example, the rate to Group 3 in Texas will be 5 cents over Group 1 in Texas from all origins. Such an adjustment is of value to the jobber at destination, according to this record, and should be followed by the carriers, to the extent possible, in checking in the new adjustment.

From Oklahoma rates to Little Rock will be 3 cents less than to Memphis.

Rates to Arkansas and the Mississippi Valley will be combinations on Kansas City from west of the Missouri River and combinations on Kansas City or St. Louis from east of the Missouri River.

The differential of 2.5 cents to Memphis for the Southeast under Memphis locally from Kansas City, Omaha, and St. Louis will be discontinued.

Rates to Minneapolis and Duluth will be on the same relative basis from North Dakota, South Dakota, Minnesota, and Iowa, and will correct undue preferences at border points described in *Grain and Grain Products, supra*, in which proposed rates designed to correct these discriminations were ordered canceled pending the outcome of the present proceeding.

The relation of the proportional rates from the Missouri River markets to Minneapolis and Duluth will be revised in order to accord with a similar revision of rates from these markets to the Mississippi Valley.

SPECIFIC ADJUSTMENTS

The foregoing discussion has been general. Consideration will now be given to specific adjustments presented upon the record, some of them by formal complaint, others by investigation and suspension proceedings, and still others by initial presentation in this proceeding.

FLAXSEED

Montana and other interests ask that rates on flaxseed be made uniformly 2 cents higher than rates on wheat, in lieu of 112 per cent of the wheat rates, prescribed in *South Dakota R. R. Commissioners v. C. & N. W. Ry. Co.*, 107 I. C. C. 35. A reversal of the above finding is not warranted.

FARM AND OTHER SEEDS

The seed interests request a revision of rates, which the record justifies. Reasonable rates would be as follows:

Kind of seed	Rate basis		
	Present	Requested	Prescribed
Broomcorn	Flax rates	Wheat	Flax.
Alfalfa	Class B	do	Do.
Lucerne	do	do	Do.
Sweet clover	Classes B and D	do	Do.
Hemp	Flax rates	do	Do.
Rape	Class A	do	Do.
Sunflower	Class B	do	Do.
Timothy	Class A	do	Do.
Millet	Flax	Flax	Do.
Grass	Class A	Wheat	Do.
Velvet beans	Corn rates	Corn	Grain.
Soya or soya beans	Wheat rates	do	Do.
Castor beans	Flax rates	do	Do.
Cane	Corn rates	do	Do.
Kaffir corn	do	do	Do.
Milo maize	do	do	Do.
Sorghum	do	do	Do.
Sudan grass	do	do	Do.
Wild mustard	do	do	Do.
Vetch	do	do	Do.

We find that the present rates are unreasonable and unduly preferential and prejudicial to the extent they exceed the prescribed rates.

AMARILLO, TEX.

Amarillo asks, on shipments to Arizona and California, to be placed in Group J with Dalhart, Tex., and a few points in Texas, Colorado, and eastern New Mexico, near Amarillo. Dalhart is 82 miles northwest of Amarillo. The transportation conditions from Dalhart and Amarillo seem to be substantially similar. There is

extensive grouping of these transcontinental rates, including practically all of Texas, all of Oklahoma and Kansas, and southern Nebraska in Groups F, G, and H, at one rate for the three groups.

We find that the failure to group Amarillo with Dalhart and other points now in Group J results in rates from Amarillo that are unreasonable and unduly prejudicial.

SOUTHWEST MISSOURI MILLERS' ASSOCIATION

The members of this association favor increased rates from southwestern Missouri and southeastern Kansas to Kansas City, in order, by a greater deduction from the basic Kansas City price, to reduce the price of wheat at the country station, and to enable them to compete with Oklahoma millers, whose country price is lower than their own, because of the higher rates into Kansas City. The request here is therefore the unusual one for increased rather than for reduced rates. It will be denied. The reduced rates prescribed herein from Oklahoma to Kansas City will result in a lesser deduction from the Kansas City price, and in same relative deduction as from southwestern Missouri and southwestern Kansas, and should remove the cause of this complaint.

TRANSIT AT KANSAS CITY, KANS.-MO.

Grain from northwestern Missouri to southwestern Missouri may be transited at Kansas City Mo., at the through intrastate rates, but is charged the higher combination of interstate rates when transited at Kansas City, Kans., in the same switching district, although, for operating reasons, grain transited at Kansas City, Mo., is frequently hauled through Kansas City, Kans. We find this difference in treatment to be unduly preferential and prejudicial in those instances in which, because of the absence of outbound proportional rates, the rate break is not to be the exclusive basis of charge.

CAIRO, ILL.

Cairo asks for rates from southeastern Missouri not higher relatively than to St. Louis, East St. Louis, and Memphis. We find that the present relation of these rates is unduly prejudicial to Cairo and unduly preferential of St. Louis, East St. Louis, and Memphis. The undue prejudice and preference will be remedied by the rates herein found reasonable.

PEORIA

To Arkansas the rates from Peoria are 6.5 cents higher than from St. Louis. Request is made for a proportional rate of 3.5 cents from Peoria to St. Louis, 157 miles.

We find that the establishment of the proportional rate requested is not warranted.

On shipments of Illinois grain to the Southeast the proportional rate from Peoria to St. Louis is 7 cents. Peoria either uses this rate or transits on the inbound intrastate rate to East St. Louis. Peoria asks that the proportional be reduced to 5 cents.

We find that this rate is unreasonable to the extent it exceeds 6 cents.

ILLINOIS SPECIFICS

To St. Louis the local rate is 11.5 cents from the so-called central Illinois group and higher or lower from other Illinois groups, according to distance. No proportional rates are published from Illinois to St. Louis. To Chicago the local rates from central Illinois are relatively higher than to St. Louis in some instances and relatively lower in others. Several of the Illinois lines publish a rate of 11.5 cents to Chicago, applicable on grain shipped out over the lakes, from substantially two-thirds of Illinois and the southwestern corner of Indiana, including East St. Louis, Ill., and Evansville, Ind. Some of the lines publish the rate as a proportional or "lake specific." Others take 11.5 cents as their division to Chicago of joint rates from Illinois to the East, constructed by adding 11.5 cents to the proportionals from Chicago.[39] This gives Chicago a rate break from most of Illinois, although short routes are not through Chicago in many instances. It also gives north-and-south lines to Chicago and connecting lines beyond long hauls on grain from Illinois to the East, in competition with the direct lines. St. Louis contends that the present adjustment unduly favors Chicago, and asks that St. Louis be permitted to go as far north as Chicago can come south at the same rate, whether its rates be called a specific or something else.[40] The same lines control the rates from central Illinois to Chicago and St. Louis, and transportation conditions are substantially similar.

We find that the present adjustment unduly prejudices St. Louis and unduly prefers Chicago, and should be corrected by making the same rates to Chicago and St. Louis for similar distances; that the rates to St. Louis and East St. Louis should be the same; and that the present plan of breaking the rates on Chicago to the East should continue. This may require proportional rates from St. Louis, properly related to the proportionals from Chicago and restricted to Illinois

[39] The lake specifics are separately published in the tariffs as the moving rates. The division equivalents are not. But both the specifics and the divisions are a matter of common knowledge to the grain trade at Chicago, as a basis of purchase.

[40] On the Illinois Central, for example, Chicago can draw grain from Illinois for distances 117 miles greater than can St. Louis at the same rate.

grain; but they can not be required here, because the rates from St. Louis to the East on domestic traffic are not here in issue. In the absence of some tariff or other complication, now unforeseen, it may be found advisable to publish the specifics as flat rates, which would necessitate the similar publication to St. Louis. The rates to Peoria should be properly related to the rates to Chicago.

DES MOINES

In comparatively recent cases [41] rates from Des Moines to Louisiana and Texas were found unduly prejudicial to Des Moines to the extent they exceeded the contemporaneous proportional rates from Omaha. In Docket No. 18900, Des Moines requests that these proportionals be continued; that additional proportional rates be prescribed from Des Moines to Kansas City and other lower Missouri River gateways; and that rates to Des Moines from States north and west of Iowa be made on a basis comparable with the rates to Minneapolis and Chicago.

The proportional rates established from Des Moines in the cases cited have resulted in many instances in combinations on Des Moines lower than the combinations on Omaha and Kansas City, also on direct routes, and in requiring Omaha and Kansas City to transit on the proportional rate from Des Moines or on through rates made on the Des Moines combination, although Omaha and Kansas City are unquestionably primary grain markets, and Des Moines can not be so regarded, though given every opportunity to achieve that status through the medium of proportional rates. The situation at Des Moines amply demonstrates that conditions at the primary markets create the proportional rates rather than that the proportional rates create the primary markets. Des Moines's status as a primary market is not substantially different from what it was at the time of *Iowa Railroad Commissioners* v. *Director General*, 63 I. C. C. 405, in which a request for proportional rates from Des Moines to the Mississippi River and Chicago was denied.[42] The chief effect of the Des

[41] Des Moines Board of Trade v. D., M. & C. I. R. R. Co., 102 I. C. C. 186; Des Moines Board of Trade v. F. D., D. N. & S. R. R. Co., 129 I. C. C. 138.

[42] "Des Moines is an important commercial city, but it is not as advantageously situated as the Missouri River cities with respect to this grain traffic. Those cities are either the termini of the principal carriers or on their main lines in direct routes. Des Moines is on the direct lines of few carriers for east-and-west traffic, and in many instances is only reached by out-of-line hauls of such traffic. The conditions which brought about the proportional rates from the Missouri River cities are in nowise comparable with those existing at Des Moines. It must be recognized that carrier competition controls at the Missouri River, and may compel the establishment and maintenance of proportional rates on a basis lower than we would be justified in prescribing from Des Moines, where similar forces are not in strife. We can not equalize markets except to correct a substantial injustice in the rates. It does not appear that Des Moines, under individual and joint rates with transit service, is laboring under such a disadvantage as a grain market, in comparison with the Missouri River cities under proportional rates, as to entitle complainants to the relief sought."

Moines proportionals seems to be to complicate the general rate adjustment rather than to help Des Moines, which could doubtless operate as well as at present under transit.

The propriety of the findings as to the proportional rates from Des Moines in the cases cited seems now to be open to grave doubt. However, the proportional rates have been effective for some time and should be disturbed only if no other course seems feasible. It would seem that Kansas City is more affected than any other primary market, and that its difficulty would be largely removed by the establishment of a proportional rate from Des Moines to Kansas City on the same basis as from Omaha to Kansas City, in lieu of the present proportional 4 cents higher from Des Moines than from Omaha. This action will accordingly be taken as a tentative solution. In no instance should the combination on Des Moines be lower than on Kansas City when the short route is through Kansas City.

It will be understood that, to points to which proportional rates are in effect from Des Moines, the proportional rates, like those from Kansas City, Omaha, and other markets, will be the exclusive basis of charge, and that overhead through rates less than the combinations of flat rates to Des Moines and proportional rates beyond will be canceled.

We find that the proportional rate from Des Moines to Kansas City is unreasonable and unduly prejudicial to the extent it exceeds 6 cents, the revised proportional from Omaha to Kansas City.

DES MOINES (DOCKET NO. 18860).

In No. 18860 Des Moines asks that proportional rates from Des Moines to points in northern Missouri on the Burlington and the Quincy, Omaha & Kansas City Railways be made on the same basis as from Omaha to the same destinations. Prior to November 12, 1925, the proportional rates to these points were the same as to St. Louis from both Omaha and Des Moines. On that date the rates to these destinations were increased about 3 cents on wheat and 2.5 cents on corn from Des Moines, but no increases were made from Omaha. Many of these destinations are directly intermediate to St. Louis from Omaha, but none of them is directly intermediate to St. Louis from Des Moines. The present rates from Des Moines are on approximately the level of the Iowa intrastate rates, lower than the Missouri intrastate rates, and among the lowest rates in the United States.

We find that these rates are not unreasonable or otherwise unlawful.

IOWA TO KANSAS CITY, CHICAGO, AND ST. LOUIS

In *Chicago Board of Trade* v. *A., T. & S. F. Ry. Co.*, 107 I. C. C. 319, a relation of rates was prescribed from Iowa to Kansas City, Chicago, and St. Louis, according to relative distances computed as therein shown, and provision was made for the addition of an arbitrary of 1 cent for joint-line hauls. This imposed a penalty on the rates to St. Louis from northwestern Iowa in most instances, because of the joint hauls to St. Louis and single-line hauls to Chicago. For rate-making purposes the many small origin groups were not disturbed, but approval was given of the carriers' proposal to compute relative average distances to the three markets from each of the small groups according to the average distance from a larger group, of which the smaller group was a part. There were three of these larger groups. One of them embraced all of the State north of the line of the Rock Island's main line from the Mississippi River west through Des Moines to Council Bluffs, comprising substantially the northern two-thirds of the State. The average distances are much greater to St. Louis than to Chicago from the eastern half of this group, and not more than 45 miles greater to St. Louis than to Chicago from the western half. The rate difference against St. Louis from this group is a half-cent without the joint-line differential and 1.5 cents with the differential. St. Louis complains that this group is too large and includes more points in the eastern half, where the distance favors Chicago, than in the western half, where the distance is less unfavorable to St. Louis, thereby inflating the rate to St. Louis by the greater average distance, a disadvantage that is enhanced by the addition of the joint-line differential. St. Louis therefore asks that the group be divided into two groups, by the line of the Minneapolis & St. Louis from Grinnell, Iowa, north to the Minnesota State line, and that the joint-line arbitrary be eliminated.

We find that the present relation of rates from Iowa to Kansas City, Chicago, and St. Louis is unreasonable and unduly prejudicial and that a reasonable relation will be that resulting from the rates prescribed herein.

IOWA AND MISSOURI TO MILWAUKEE

From Iowa north of the main line of the Rock Island from Davenport west through Des Moines to Council Bluffs the rates to Milwaukee are the same as to Chicago, but from Iowa and Missouri on and south of that line (except from the main line of the Milwaukee from

Kansas City to Chicago) the rates are combinations on Chicago, and therefore 5 cents higher than to Chicago. The relative distances and transportation conditions warrant no difference in rate to Milwaukee and Chicago from any of this territory, and to the extent of any difference we find that the relation of rates is unreasonable and unduly prejudicial.

IOWA TO DULUTH (INVESTIGATION AND SUSPENSION DOCKET NO. 3089)

Rates from points in Nebraska just west of Omaha to Duluth, made by combining flat rates to Omaha and proportional rates beyond, are lower than from directly intermediate points in Iowa to Duluth, mainly because the proportional rate from Omaha to Duluth is only 1 cent higher than from Omaha to Minneapolis, whereas the rates from the intermediate Iowa points to Duluth are made on the Minneapolis combination and are therefore 6.5 cents higher than to Minneapolis. The suspended schedules would remove these fourth-section departures by increasing the rates from the Nebraska points. The revision herein made will correct this situation.

IOWA TO NORTH PACIFIC COAST (DOCKET NO. 19620)

Complainant asks that the rate of 71.5 cents from Group E in Iowa to the north Pacific coast be reduced to 64 cents, or to 5 cents higher than the rate from Nebraska Group F to the north coast. To California terminals the rate of 66 cents from Group E is 5 cents higher than the rate from Group F.

We find that the rate from Group E in Iowa to the north Pacific coast is unreasonable and unduly prejudicial to the extent it exceeds the rate from Group F to the same points by more than 5 cents.

WICHITA

Wichita asks for proportional rates to the East and South similar to those from Kansas City, contending that its confinement to transit requires larger stocks to be carried, narrows origin and destination territories to certain railroads, and restricts outbound shipments to destinations on the line bringing the grain inbound to the market. Under proportional rates from rate-break points grain may move out as "free" grain over any line, regardless of the identity of the inbound carrier.

A similar request for proportional rates from Wichita was denied in *Wichita Board of Trade* v. *A. & S. Ry. Co.*, 29 I. C. C. 376, where the conditions which gave rise to the establishment of the proportional rates from Kansas City and other Missouri River markets are discussed, and the lack of substantially similar conditions at Wichita

and other interior markets, not located at natural rate-breaking points where inbound lines end and outbound lines begin, is shown. The pertinency of this differentiation becomes more apparent when it is stated that the proportional rates from the Missouri River and other unquestioned primary markets are mainly due to the voluntary action of the carriers in meeting competitive conditions. These same competitive conditions, had they existed, would long ago have forced proportional rates from Wichita, as they did from the natural rate-break points, without an order from any regulative authority.

The situation at Wichita is not comparable with that at the Missouri River and other primary markets from which proportional rates apply, and the request for proportional rates from Wichita will again be denied.

KANSAS TO SOUTHERN MISSOURI (INVESTIGATION AND SUSPENSION DOCKET NO. 3278)

The proposal here is to cancel the present rates on grain from Kansas to southern Missouri (on and south of the Rock Island main line from Kansas City to St. Louis), and to establish a more complete adjustment of one-factor rates, on the basis of an average of the single and joint line rates prescribed in the *Oklahoma Corporation Commission case*, *supra*, to be applied for average distances between basic groups of origin and destination, with fixed differentials over or under the basic groups between all other groups. The Wichita group is the basic origin group and the Springfield, Mo., group the basic destination group. The proposed rates represent both increases and reductions, the reductions predominating. They would apply through Kansas City as well as over other routes.

The proposed origin group and relations in Kansas are almost identical with those employed in making the rates from Kansas to Kansas City, except that lower rates are proposed from south of the Union Pacific's main line, in order to give recognition to shorter hauls from southern Kansas than from northern Kansas.

Most of the shippers favor the proposed rates. Millers in northern Kansas object to the disturbance of their present parity with competing millers in southern Kansas. Other objections are the failure to propose similar increased rates intrastate in Kansas and Missouri, the disturbance of destination relations, and the measure of the proposed rates compared with the respective levels of the rates to and from the terminal markets.

The present rates are on the so-called Missouri River rate basis, under which a through rate on grain between interior points in Kansas and southern Missouri may not exceed the highest rate between the Missouri River and the interior points. This results in

low and preferential rates, and has been the source of much complaint from shippers and carriers. In *Grain and Related Articles*, 146 I. C. C. 391, this basis of making rates from Kansas to Oklahoma was condemned. In *Rodney Milling Co.* v. *St. L. S. F. Ry. Co.*, 147 I. C. C. 569, the scale prescribed in the *Oklahoma Corporation Commission case* was held reasonable for application from Kansas to Arkansas and southern Missouri. To some parts of the destination territory the distances are less from northern than from southern Kansas. The general trend of this traffic is toward the East, in connection with which no differential is made between northern and southern Kansas. Relative distances are not always closely observed in making group rates.

We find that the proposed schedules have not been justified. This is without prejudice to respondents filing proposed schedules of rates based on the interior scales and groups herein prescribed, using average mileages from or between groups.

CENTRAL NEBRASKA GRAIN SHIPPERS' ASSOCIATION

Grain dealers at Columbus, Aurora, Kearney, and Superior complain that the rate on coarse grains from Nebraska to California terminals applies through Omaha from a point in the group 150 miles west of Omaha, with a maximum out-of-line haul of approximately 300 miles, to the disadvantage of the interior Nebraska dealers, by reason of Iowa corn moving out on the transit balance of the Nebraska rate lower than that of the Iowa rate,[43] and by reason of a price in the country lower by the amount of the flat rate into Omaha than it would be if this transit were canceled.[44]

The transit in question has been reviewed and approved in several cases. *Routing of Transcontinental Grain and Grain Products*, 73 I. C. C. 116; *Transit Privileges on Transcontinental Grain*, 85 I. C. C. 43; *Grain to Pacific Coast*, 98 I. C. C. 158; *Transit Privileges on Grain*, 113 I. C. C. 375; *Aberdeen Commercial Club* v. *C. P. R. R. Co.*, 126 I. C. C. 498. In the case next to the last cited the suggestion was made that compensation for the out-of-line service might be obtained either by assessing out-of-line charges or by a higher rate from interior Nebraska when the routing is through the Missouri River gate-

[43] To California 61 cents from Nebraska and 66 cents from Iowa. To Omaha 16 cents from Nebraska and 10 cents from Iowa. Iowa corn may be shipped at the transit balance of 45 cents from Nebraska and pay a total of 55 cents instead of 66 cents. While Iowa corn may be substituted for Nebraska corn, the transit balance, upon surrender of a 10-cent inbound expense bill from Iowa, would be 56 cents and not, as complainants seem to think, 45 cents.

[44] The contention is that with the Omaha price $1 the Nebraska country price would be 84 cents. The Omaha dealers' coast price, $1.45 under this transit, would be $1.61 without it, and the country dealer receives only 84 cents ($1.45 minus 61 cents) instead of $1 ($1.61 minus $0.61).

ways. The carriers have apparently taken no action in respect of this suggestion. The Missouri River interests want the back-haul territory extended even farther west. Certain of the Nebraska farm organizations want the present practice continued.

Extensive back-haul arrangements are open to the interior Nebraska dealers, such as hauling shipments from Sanborn east 200 miles to Superior and back to California at the group rate applicable from both points, or from Brady Island to Kearney and directly back through Brady Island to the Pacific coast. The differentiation offered by complainants between these practices and the one complained of is not convincing. The cancellation of the transit at Omaha and continuation of the transit at the interior could not well be justified. The arrangement seems desirable at both Omaha and the interior. The out-of-line haul is substantial but not proportionately more than many others incidental to shorter hauls and not complained of. The transit in question has not been shown to be unlawful.

It will be understood that there are no proportional rates from Omaha or other Missouri River market to California, and that, if there were, the same requirement as to observance of the rate-break combinations would be required as in the case of shipments through those markets to the East, Southwest, and Mississippi Valley.

RATES FROM COLORADO AND NEBRASKA TO KANSAS AND OKLAHOMA (DOCKETS NOS. 16322 AND 16612)

From Colorado and Nebraska to Kansas and Oklahoma combination rates now apply both through the Missouri River markets and through Superior, Nebr. The rates and distances through Superior are in nearly every instance less than through the Missouri River markets, though from a large part of the origin territory the short route is not through Superior. Complainants want through rates with transit at Superior. To prescribe through routes and joint rates through that gateway would in many instances short haul both the originating and delivering carriers. The interior scale herein prescribed for this territory will provide reasonable rates between the points here in issue, and should be applied subject to the rights of the carriers in respect of short hauling.

MINNEAPOLIS TRANSIT

The through rates to Minneapolis are the same as to Duluth from Montana and from South Dakota west of Mobridge. The proportional rate from Minneapolis to Duluth is 6.5 cents. Minneapolis is directly intermediate to Duluth on the Milwaukee. On

shipments to Duluth a maximum transit charge of 2.5 cents above the direct rate is made for milling at points west of Minneapolis, but the combination on Minneapolis is charged when the billing is at Minneapolis, and the charge above the direct rate is therefore the proportional rate of 6.5 cents. On shipments to Duluth stopped at Minneapolis for storing and cleaning the same transit charge applies as at the points west of Minneapolis. In other words, shipments to Duluth may be stored and cleaned, but not milled, at Minneapoliis at the same transit charge as at the points west of Minneapolis. The carriers propose to correct this discrimination against Minneapolis by canceling the transit charge for milling at points west of Minneapolis, and for storage and cleaning at Minneapolis, and make the millers both at points west of Minneapolis and at Minneapolis pay the Minneapolis combination.

From a large part of the territory described the rate on bran, shorts, and middlings is the same as on coarse grains, that is, 90 per cent of the wheat rate, to both Minneapolis and Duluth. The through rate to Duluth on coarse grains is applied also on bran, shorts, and middlings, when wheat is milled at points west of Minneapolis, but the through rate to Duluth on wheat is applied when wheat is milled at Minneapolis. This gives mills at points west of Minneapolis an advantage over mills at Minneapolis of as much as 8 cents in addition to the advantage incident to the transit charge for milling. The carriers propose to remove this discrimination by making the wheat rate to Duluth apply on bran, shorts, and middlings, whether the milling is at points west of Minneapolis or at Minneapolis.

Our previous findings herein make the Minneapolis combination applicable to Duluth on shipments milled both at Minneapolis and at points west of Minneapolis. They also make one rate for both wheat and coarse grains, which will also be applicable on bran, shorts, and middlings. It therefore becomes unnecessary to discuss the influence of the requested adjustment upon the rates of the Great Northern and Northern Pacific, which have direct routes to Duluth not through Minneapolis and indirect routes to Duluth through Minneapolis.

RAIL RATES FROM MINNEAPOLIS TO NEW YORK

Minneapolis presents this situation in respect of Montana and North Dakota wheat milled at Minneapolis and reshipped over all-rail routes to New York:

The present rates on wheat from Montana and North Dakota are the same to Minneapolis and Duluth. They were also the same prior

to 1918. Prior to 1918 the difference between the all-rail rate on flour from Minneapolis to New York and the lake-cargo rate on wheat from Duluth to Buffalo plus the all-rail rate on flour beyond was 7.23 cents. To-day that difference is 15.435 cents, due to percentage changes in the rail rates from Minneapolis to New York and from Buffalo to New York, the lake-cargo rates being approximately the same to-day as they were prior to 1918. Minneapolis contends that approximately the difference that existed prior to 1918 should be restored, if Minneapolis is to be enabled to compete with Buffalo in the milling of North Dakota and Montana wheat.

This situation, if properly before us and found to be improper, could be readjusted to accord substantially with the contention of Minneapolis either by reducing the all-rail rates from Minneapolis to New York or by increasing the ex-lake rate from Buffalo to New York. It need not be here further discussed, inasmuch as the rates from Minneapolis to New York are not directly within the scope of this investigation, and are not sufficiently related indirectly to the issues within the scope of the investigation to warrant definite action thereon.

MINNEAPOLIS TO NORTH PACIFIC COAST

On wheat to north Pacific coast points from South Dakota transit is permitted at Omaha and other Missouri River markets, but not at Minneapolis, on a shorter route. Coarse grains may be stored and milled at Omaha, but only stored at Minneapolis, a penalty being assessed for milling at Minneapolis.

We find that this granting of transit at Omaha and not at Minneapolis subjects Minneapolis to undue prejudice and disadvantage and gives to Omaha an undue preference and advantage.

FARINA FROM MINNEAPOLIS TO NORTH PACIFIC COAST

On farina (Cream of Wheat) from Minneapolis to north Pacific coast ports there is a special commodity rate of 75 cents, minimum 60,000 pounds. The rate is also 75 cents on flour. Between points in the Pacific Northwest the rate of the same carriers on farina and other cereals is higher than on flour. In *Cream of Wheat* v. *A., T. & S. F. Ry. Co.*, 91 I. C. C. 45, a rate of 95 cents, minimum 24,000 pounds, on cereals generally, including farina, was found not unreasonable.

We find that the charging of the flour rates on farina from Minneapolis to north Pacific coast points is not justified.

SOUTH DAKOTA TO NORTH COAST

To a large destination territory embracing practically all of Washington, Oregon, and Idaho, and about two-thirds of Montana, a group rate applies from Nebraska, Kansas, Minnesota, eastern South Dakota, and western Iowa, for hauls ranging from 403 to 2,800 miles. South Dakota requests either a modified distance basis or a division of both origin and destination groups into several smaller groups, grading back from the north-coast group. To California there is a less extensive grouping. There are also intermediate groups at Colorado common points and Utah common points. The proposal is strongly opposed by some of the parties of record as disrupting transcontinental groupings.

We find that the present grouping places an undue burden on short-haul traffic and is unreasonable and unduly prejudicial, and that a reasonable adjustment would provide for two intermediate destination groups.

GRAND FORKS, N. DAK.

Grand Forks is on the main line of the Great Northern, 300 miles west of Minneapolis. It contends generally for a removal of the present transit charge at Grand Forks; a rate break to Minneapolis; proportional rates to Duluth with free transit at Grand Forks; through rates to Chicago less than the Minneapolis combination, with transit at Grand Forks; through rates less than the rate-break combination to central and trunk-line territories; and various other extensions of free transit.

Our comment on the request of Wichita for the establishment of proportional rates are equally applicable here. The granting of the other requests of Grand Forks is not warranted.

COLORADO MILLING INTERESTS

Complaint is made that to north Pacific coast terminals the rates from Montana, Oregon, and Washington are too low in comparison with the contemporaneous rates from Colorado, Utah, and southern Idaho. In *Ogden Grain Exchange* v. *A. E. R. R. Co.*, 126 I. C. C. 255, relatively higher rates were approved to Portland from Colorado, Idaho, and Utah than from Montana.

The revised rates herein will correct any present inequalities in this relation.

To points in New Mexico and to Pecos and El Paso, Tex., Colorado milling interests ask for the establishment from Alamosa, Colo., of the basis applicable from Denver, and from Montrose, Colo., of rates 15 cents higher than from Denver. There is no uniform rela-

tion at present. The distance from Alamosa is about 300 miles less, and from Montrose about 100 miles more, than from Denver. The conditions are not as favorable from Alamosa and Montrose as from Denver, a circumstance counteracted to some extent, in the adjustment asked, by the differences in distance.

We find that on this traffic the rates from Alamosa are unreasonable to the extent they exceed the contemporaneous rates from Denver, and that the rates from Montrose are unreasonable to the extent they exceed the rates from Denver by more than 15 cents, the adjustment in each instance to be subject to the interior scale prescribed for this territory in Appendix D as maximum.

To most of the affected territory the new rates from Alamosa and Montrose will grade into the group rates herein prescribed from Denver to western New Mexico. The rates herein prescribed from Denver to El Paso should be scaled back at intermediate points in eastern New Mexico over reasonably direct routes.

Grain and milling interests on the Union Pacific in Kansas ask for joint rates to Arizona on the Santa Fe on the same basis as obtains from other lines in Kansas to these Santa Fe points. The Santa Fe does not oppose the establishment of these joint rates, applied through Denver, provided the Union Pacific will also participate in joint rates through Denver to California.

We find that the rates complained of from points on the Union Pacific in Kansas are unreasonable and unduly prejudicial to the extent they exceed joint rates from contiguous points on other lines in Kansas.

Arizona, California, Nevada, western Utah, and western New Mexico are blanketed at a rate of 59 cents from the western and southern portions of eastern Colorado, and at a rate of 63 cents from the eastern portion. To the north Pacific coast all of eastern Colorado is grouped at a rate of 59 cents. From Idaho and Utah to this general territory the rates apply from a number of small origin groups to specific destinations. A somewhat similar adjustment obtains from northern California and from Montana. In the revision herein Colorado origin groups are made the same to California as to north-coast terminals, and specific rates are prescribed to intermediate points in Arizona and New Mexico.

SHERIDAN, WYO.

Sheridan, Wyo., complains of the relation of rates from Sheridan as compared with rates from competing mills in Montana, Colorado, and Nebraska, to destinations in Wyoming, Montana, Colorado, western South Dakota, and Nebraska. Due mainly to the lower intrastate rates in States contiguous to Wyoming, and to the absence of

joint interstate and intrastate rates from Sheridan to competitive points, the rates from Sheridan on this traffic are as much as 100 per cent higher than from competing points. The interior scale prescribed herein for this territory will remove these inequalities.

Sheridan also complains of the relation of rates from Sheridan and Denver to the East, Southwest, and the Pacific coast. To California, Arizona, New Mexico, and the Southwest generally the distance from Sheridan is approximately 600 miles farther than from Colorado common points. We are asked to prescribe a maximum differential of 12 cents over Denver to the East and Southwest. We find that rates from Sheridan are unreasonable to the extent they exceed the contemporaneous rates from Billings, Mont., by more than 5 cents to California and north Pacific coast terminals, and to the extent they exceed the contemporaneous rates from Denver by more than 15 cents to other destinations.

MONTANA

The State of Montana complains of branch-line rates relatively higher than from main-line points to both eastern and western terminals, and requests joint rates from points on the Burlington to Minneapolis via Huntley and the Northern Pacific on the same basis as from points on the Northern Pacific to Omaha via Billings and the Burlington. It also complains of alleged inequalities in rates from the Great Northern triangle territory between Havre, Shelby, and Great Falls. The revised rates from Montana will dispose of these complaints.

Montana also complains of the rates to California, Arizona and New Mexico. We find that the rates from Montana to these States are unreasonable and unduly prejudicial to the extent they exceed the contemporaneous rates from Pocatello, Idaho, by 15 cents from Havre, Shelby, Billings, Lewiston, Great Falls, and Harlowton, by 11 cents from Helena, and by 8 cents from Butte.

Montana seed interests request a tariff provision for concentrating less-than-carload lots of seeds for reforwarding in carloads at the carload rates from original point of shipment to final destination, and a provision for cleaning seeds in transit. The request first mentioned is not within the legitimate scope of transit. The other request is for a service similar to the conditioning of wheat, and tariff provision for it may properly be made.

MONTANA TO DULUTH (INVESTIGATION AND SUSPENSION DOCKET 3046)

Grain from Northern Pacific stations in Montana, competitive with Milwaukee stations, may be stopped at Minneapolis to try that market, and be forwarded to Duluth, in the original car, at the

through rate to Duluth, but grain from directly intermediate Northern Pacific stations is denied this arrangement. The suspended schedules would remove the discrimination against the intermediate points by canceling the transit arrangement from the farther distant origins and making the future rates to Duluth by combination on Minneapolis. This issue is disposed of by the findings herein relating to the application of proportional rates and the territory from which rates to Duluth are to be combinations on Minneapolis.

OGDEN, UTAH

The Ogden Grain Exchange requests a downward revision of the rates on corn from Colorado, Nebraska, and Wyoming to Utah, Idaho, and Nevada to conform to whatever basis is established from Utah and Idaho to the Missouri River. The present westbound rates closely approximate the Pacific coast terminal rates. Grand Island, Nebr., is a typical origin and Winnemucca, Nev., and Huntington. Oreg., are typical destinations.

We find that the group rates from Grand Island to Winnemucca and Huntington are not unreasonable, but that the rates from Grand Island to points in Idaho, Utah, and Nevada east of Huntington and Winnemucca are unreasonable to the extent they exceed the rates prescribed in the interior scale for intermountain territory in Appendix D.

Ogden also requests the establishment of reasonable joint and local rates between points on the Oregon Short Line, Denver & Rio Grande Western, Union Pacific, Los Angeles & Salt Lake, Nevada Northern, and Southern Pacific. Joint rates are not now applicable between points on these lines. The lowest combinations are much higher than rates for like hauls in the same and other territories of similar transportation conditions, and local rates to intermediate points are frequently the same as the rates to terminal points for considerably longer hauls.

We find that the present rates are unreasonable to the extent they exceed the interior scale prescribed herein for this territory for both joint and single-line hauls.

RATES FROM SOUTHERN IDAHO TO SEATTLE (DOCKET NO. 20474)

Complainant alleges that the rates on grain from southern Idaho to Seattle are unreasonable to the extent they exceed the contemporaneous rates to Portland. Reparation is prayed, but that issue was deferred pending decision in this proceeding. At the time the shipments moved the rates were from 1 to 10.5 cents higher to Seattle than to Portland. The present rates to Seattle exceed those to Portland by 8 cents.

The origin points are local to the Oregon Short Line. Seattle is on the Oregon-Washington Railroad & Navigation Company lines. Both lines are parts of the Union Pacific system. The rates from southern Idaho are applicable over the Union Pacific lines only through Portland, on which route Seattle is 188 miles beyond Portland. The short line is through Pendleton and Yakima, in connection with the Northern Pacific. Over this route, which would short haul the Union Pacific, Seattle is 87 miles farther than Portland.

Complainant relies mainly on a comparison of rates for equal distances from points on other lines in Montana to Seattle. Defendants refer to rates and differences to Seattle and Portland on other commodities in the same general territory, and to grain differentials prescribed in other sections of the country.

We find that the rates charged were not unreasonable. Rates for the future are herein prescribed as a part of the general readjustment of rates throughout the western district.

BRAN, SHORTS, AND MIDDLINGS IN PACIFIC NORTHWEST

Bran, shorts, middlings, and other mill feeds are accorded flour rates within the Pacific Northwest and charged from 1.25 to 17 cents higher than the flour rates over rail-and-water routes from the Pacific Northwest; Montana, and North Dakota to California ports. The differences are higher to Los Angeles than to San Francisco and higher to San Diego than to Los Angeles.

We find that the rates complained of are unreasonable to the extent they exceed the contemporaneous rates on flour.

TRANSIT AT TACOMA, WASH.

The through rate on corn from South Dakota to the Pacific Northwest is protected on shipments transited at Minneapolis, but the combination on Tacoma is charged on shipments from South Dakota to Enumclaw, Wash., transited at Tacoma, Wash., because of an out-of-line haul of about 20 miles. The out-of-line service is much greater at Minneapolis than at Tacoma. The competitive situations at Minneapolis and Tacoma are not comparable, but the extension, herein required, of the north-coast blanket rate to Washington branch-line points from Montana and east will remove much of the disadvantage alleged by the millers in Montana and transit operators at Tacoma.

OREGON

August 29, 1924, order No. 1131 of the Oregon commission prescribed maximum intrastate distance rates and prohibited increases in lower rates to the scale basis. The joint-line scale was slightly

higher than the single-line scale. These scales resulted in reductions from branch lines of the Oregon-Washington and in the joint rates of the Oregon-Washington and Southern Pacific. From main-line points to Portland and other destinations there were few changes in rates, which were already about 13 per cent below the scale. The carriers made the rates inapplicable on shipments stopped in transit. The Federal court issued a temporary injunction against the Oregon commission's order and deferred final action until decision herein, the carriers in the meantime charging the rates and giving bond for any reparation later found to be due.

Prior to order No. 1131 the rates from a part of Oregon, including Bend, were on a common level to Portland, over both the intrastate route of the Oregon-Washington and the interstate route of the Spokane, Portland & Seattle, and on the same general level as from eastern Washington to Portland. Rates to Portland were also the same on domestic and export shipments. That order made the intrastate rates lower than the interstate rates, and lower also than the export rates. More than 90 per cent of the grain shipped to Portland is exported, and a large part of it is billed for export. The Oregon commission contends that intrastate shipments to Portland, though subsequently exported, are not export shipments, because their destination is not definitely known upon arrival at Portland. The rates prescribed in Appendix D will be reasonable for application over both interstate and intrastate routes and for export.

Prior to order No. 1131, rates to destinations south of Portland, on interstate and intrastate shipments, were combinations on Portland, and all grain therefore paid the same rate south of Portland. On interstate shipments transited at Portland that [illegible]ustment still obtains, but on intrastate shipments, due to through [illegible]es less than the combinations resulting from order No. 1131, the balances south of Portland vary on transited shipments, generally decreasing with the longer-haul traffic.[45] The best interests of carrier, shipper, consumer, and market would seem to lie in a constant balance south of Portland.

On transcontinental shipments the coast-terminal rate to Washington embraces the entire State west of the Cascades. Oregon west of

[45] The price to the producer is said to be the Portland price minus the freight and handling charges to Portland. Under a mileage scale the producer at Joseph, 376 miles from Portland, would therefore apparently receive less for his grain than the producer at Pendleton, 218 miles from Portland, because of the greater inbound deduction. To Eugene, Oreg., for example, the transit balance is 4 cents on shipments from Joseph and 11 cents on shipments from Pendleton. The soundness of the Oregon commission's argument that the Portland miller would most likely buy his grain at Joseph, at a premium price, because of the lower balance beyond Portland of the rate from Joseph, is open to serious doubt, and, if accepted, would mean a corresponding loss to the producer at Pendleton.

the Cascades pays an arbitrary over the Portland terminal rate. To Tillamook, for example, the arbitrary is $1 per ton if the grain originates east of the Missouri River and $4.30 per ton, or the full local rate beyond Portland, if it originates west of the Missouri River. Tillamook dairy interests compete with dairy interests at Astoria. Astoria pays $15 and Tillamook $129 for the service beyond Portland on a 30-ton car of mill feed shipped from west of the Missouri River and transited at Portland. The Oregon commission complains of this situation.

We find that the present difference in treatment of Washington and Oregon in the matter of terminal rate blanketing on transcontinental shipments subjects Oregon to undue prejudice and disadvantage and gives to Washington an undue preference and advantage.

THE COLUMBIA BASIN DIFFERENTIAL

Prior to *Inland Empire Shippers League* v. *Director General*, 59 I. C. C. 321, 62 I. C. C. 633, rates on grain, with some exceptions, were the same to Portland and Astoria, Oreg., and to Vancouver, Seattle, Tacoma, and other Puget Sound ports in Washington, from all points of production in a large section of the Columbia River basin, both north and south of the Snake River, extending roughly from Pendleton, Oreg., on the south to some distance beyond Spokane, Wash., on the north. Astoria is on the south side of the Columbia River, about 10 miles from the Pacific Ocean. Portland is about 100 miles inland from Astoria, on the Willamette River, about 10 miles from its confluence with the Columbia, and about the same distance from Vancouver, on the north bank of the Columbia. Seattle is 183 miles and Tacoma 143 miles north of Portland. Longview, a newer but promising city in southern Washington, is on the north bank of the Columbia River, 39.6 miles north and west of Vancouver. The average distances from all agency stations in the territory of origin mentioned are 372 miles to Seattle and 378 miles to Portland. All of the points mentioned have excellent port facilities for the handling of grain and are in keen competition with each other.

In the report mentioned it was required that from northeastern Oregon and southeastern Washington, south of the Snake River, comprising a small corner of the equalized origin territory described, the rates to Portland and Vancouver should be 10 per cent lower than to Puget Sound ports, because of shorter distances and water-level hauls along the Columbia River to Portland and Vancouver, and routes over the Cascade Mountains to Puget Sound ports. The differential was established by increasing the rates 5 per cent to Seattle and reducing the rates 5 per cent to Portland and Van-

couver. From the territory north of the Snake River, from which the distance favored Seattle, no change in the equalization of Portland, Vancouver, and Seattle was required. From the differential territory the average distances over all lines are 269 miles to Portland and 305 miles to Seattle, a distance of 36 miles. The difference is 20 miles on the Northern Pacific and 52 miles on the Oregon-Washington Railroad & Navigation lines.

In *Walla Walla County Farm Bureau* v. *N. P. Ry. Co.*, 107 I. C. C. 110, decided January 4, 1926, the producers in differential territory contended that the differential tended to reduce competition of Puget Sound buyers, and to reduce prices, but the differential was not disturbed. In this proceeding Puget Sound shippers, the Department of Public Works of Washington, and producers in the differential area in Washington ask for removal of the differential, or for a suitable differential in favor of Puget Sound ports from the territory north of the Snake River, and nearer to Puget Sound ports than to Portland, if the differential from south of the Snake River is not removed. Some of the producers in the differential area in Oregon oppose the differential, while others do not oppose it, provided the rates to Portland are not increased. Portland interests, with some exceptions, and the Oregon Public Service Commission, approve the differential, and want an extension of the origin territory from which it applies. Longview, now on the Seattle basis generally, requests rates not higher than to Portland, because its route is also along the Columbia River, and because its lesser terminal expense tends to counterbalance its additional 40 miles in comparison with Portland and Vancouver. The rates to Longview are higher than to Portland by 5 cents from Oregon-Washington Railroad & Navigation branch-line points in Oregon west of Umatilla; by 2 cents from main-line points Pendleton and west, and from south of the Snake River; and by 3 cents from points in Idaho east of Weiser.

The differential territory is served by the Oregon-Washington Railroad & Navigation Company and the Northern Pacific. The routes to Portland are over the Oregon-Washington, along the south bank of the Columbia; and over the Northern Pacific to Pasco or Kennewick, thence along the north bank of the Columbia over the Spokane, Portland & Seattle, which is jointly owned by the Great Northern and the Northern Pacific. The routes to Seattle are over the Northern Pacific through Pasco, Kennewick, and Yakima, Wash., over the Cascades; and over the Oregon-Washington through Kennewick to Yakima, thence over the Northern Pacific. The Northern Pacific has always been desirous of maintaining the equalization of Puget Sound and Columbia River ports, regardless of the difference in distance and character of haul.

We find that the differential is reasonable to Astoria and Puget Sound ports, but that the rates to Longview will be unreasonable and unduly prejudicial to the extent they exceed the contemporaneous rates to Portland by more than half a cent.

CALIFORNIA MIXED-FEED TRANSIT

Los Angeles millers of wheat can ship out their bran, shorts, and middlings, the principal by-products of wheat flour milling, under transit balances, either in the form of bran, shorts, and middlings or as constituent parts of mixed-feed shipments (which take the same through rate as wheat and flour), upon the surrender of sufficient inbound wheat billing. The transit tariffs here in issue include wheat, but not bran, shorts, and middlings, in the list of inbound commodities entitled to transit, and include also bran, shorts, and middlings in the list of outbound commodities that may be forwarded from the transit point. They also include mixed feed in the outbound list. The Los Angeles millers are also feed manufacturers, and they ship out their bran, shorts, and middlings, under the authorization of these tariffs, as a part of the feed mixtures. The mixed feed is manufactured in separate units of the flour-mill operation, located, in at least one instance, as far as 3 miles from the flour mill proper. Mixed-feed manufacturers who are not also millers, but who buy their bran, shorts, and middlings from the flour miller, are not given the benefit of the transit balance on their shipments of mixed feed, because bran, shorts, and middlings, while included in the list of outbound transit commodities, are not also included in the list of transit commodities inbound. A flour miller, however, may purchase bran, shorts, and middlings from another flour miller and get the benefit of the transit balance on his outbound mixed-feed shipments. The mixed-feed dealers who are not also flour millers allege an undue preference of the flour millers in this respect.

An additional complaint of discrimination against the Santa Fe, Southern Pacific, and Union Pacific is that, east of Ogden, Albuquerque, and El Paso, on their lines, bran, shorts, and middlings are included in both the inbound and outbound lists of transit commodities, and transfer of inbound wheat billing to independent feed manufacturers is permitted. There is competition between the eastern and the California mixed-feed manufacturers.

Clearly the California mixed-feed manufacturers are unduly prejudiced, and the millers at California and mixed-feed manufacturers in the East unduly preferred, and we so find. This discrimination will be removed by our findings in respect of transit on mixed feeds.

ROLLED WHEAT RATES EASTBOUND VERSUS WESTBOUND (DOCKET NO. 21079)

Complainant asks that on rolled wheat between California, on the one hand, and Utah, Idaho, and Wyoming, on the other, the rates be made the same in both directions, instead of 3 cents higher eastbound than westbound, as at present. A prayer for reparation was withdrawn.

We find that the charging of higher rates eastbound than westbound on this traffic is unreasonable and unduly prejudicial.

CALIFORNIA MIXED-CARLOAD RULE

Request is made of the California carriers for a mixed-carload rule providing, in respect of intrastate grain and grain products, for the application of the rate and weight on each commodity in the mixture separately, instead of the highest rated commodity in the mixture for the whole carload. The rule requested is applicable in the Pacific Northwest and would seem to be reasonable for California.

EXPORT RATES

The foregoing discussion has been of domestic rates. Export rates remain for consideration. These include rates from Kansas, Oklahoma, Texas, and eastern New Mexico to the Texas Gulf ports, and their relation to rates to New Orleans; rates from St. Louis and Missouri River gateways, and points basing thereon, and from central Illinois to New Orleans, and their relation to rates from the same origins to the Atlantic ports; rates from Buffalo to eastern ports; the relation of rates from Buffalo and Toledo to eastern ports; the relation of rates to the eastern ports; rates from western Montana to north Pacific coast ports; and rates from California to San Francisco Bay ports. These will be considered in the order named.

The distance rates prescribed from Oklahoma to Texas in the *Oklahoma Corporation Commission case* were for both export and domestic traffic. The distances from Oklahoma are generally less to Houston than to Galveston, and the rates from Oklahoma to Houston, established as both export and domestic rates, are applied to Galveston as export rates, with the result that to that port the domestic rates, made on the scale basis, are slightly higher than the export rates. Likewise from Oklahoma the domestic rates to Houston were lower than to New Orleans, and the rates to Houston were applied as export rates to New Orleans. This made the export rates to New Orleans less than the corresponding domestic rates, just as in the case of the rates to Galveston. The rates from Kansas to Galveston and New Orleans are also slightly higher on domestic than

on export shipments. The revision herein makes one rate for both export and domestic shipments from Oklahoma and Kansas to Texas ports and New Orleans, except that the export rates will be lower than the domestic rates to New Orleans in those instances in which a complete or partial equalization of export rates to New Orleans with those to Galveston is made voluntarily by the carriers in accordance with the permission granted in *Galveston Commercial Asso.* v. *G., H. & S. A.*, 100 I. C. C. 110, to be later discussed in more detail.

GALVESTON-NEW ORLEANS DIFFERENTIALS

The relation of the rates to Texas ports and New Orleans is of great importance to the producers of southern Kansas and of Oklahoma and Texas. In the case last cited maximum differentials of 5 cents from Texas, 4 cents from Oklahoma, and 3 cents from southern Kansas were prescribed for application to Galveston under New Orleans, for distances favoring Galveston by more than 100 miles. In the report on further hearing in that case, 128 I. C. C., 349, these differentials were modified to become 2 cents south of the line of the Rock Island westward through Oklahoma City and Amarillo; 1 cent on and north of that line to and including the line of the Rock Island westward through Hutchinson and Liberal; and nothing north of the latter line. The finding in the report on further hearing is adhered to, subject to the modification that the territory from which there is to be no differential will be on and north of the line of the Rock Island westward through Hutchinson and Liberal instead of north of that line. In eastern Texas and Oklahoma no differential was prescribed in the case cited, and none is warranted. The request of Texas for equalization of Rio Grande gateways with Galveston and Houston on export traffic is denied.

OKLAHOMA-KANSAS DISCRIMINATION REMOVED

The rates from Kansas to Texas were not in issue in the *Oklahoma Corporation Commission case*, in which rates from Oklahoma to Texas were reduced, and the relation of rates from Kansas and Oklahoma to Texas ports has been, since that decision, the subject of complaint from Kansas of a discrimination generally conceded to be unjust. Following the submission of the present proceeding the carriers voluntarily reduced their export rates from Kansas City and Oklahoma to the Gulf 7 cents.[46] Later the carriers from Kansas,

[46] The reduced export rate of 23.5 cents represents the transit balance beyond Kansas City of the former rate from Colorado common points to the Gulf, also of the former proportional rate of 31.5 cents from Omaha to the Gulf, and is about 2 cents lower than the transit balance of rates from that part of Kansas from which, in *Southern Kansas Grain Asso.* v. *C., R. I. & P. Ry. Co.*, *supra*, direct rates less than the Kansas City combination were permitted to apply through Kansas City with transit, and from

Colorado, and southern Nebraska reduced their rates over direct routes to the Gulf in a like amount, in order to preserve the relation between the direct rates and the combinations on Kansas City. The reduction was substantially to the same relative level as then applied from Oklahoma, and had the effect of removing the discrimination in favor of Oklahoma, of which Kansas complained. The revised rates herein are on the same general basis from Kansas, Oklahoma, and Texas to the Texas ports and New Orleans, and are the same as on domestic shipments, as already explained. They will also dispose of the complaint of Oklahoma of an alleged undue preference of Texas on export shipments to Texas ports.

EXPORT RELATION OF MONTREAL, NEW ORLEANS, AND BALTIMORE

For years the export rate from St. Louis to New Orleans has been made differentially less than from St. Louis to Balitimore. The differential was 4 cents prior to the world war, became as high as 13 cents during and following the war, and during the pendency of this proceeding was 7 cents.[47] Chicago requested its restoration to 4 cents. New Orleans, because of alleged disadvantages in rail rates to New Orleans and ocean freights beyond, in comparison with the rail-and-ocean rates through Baltimore, requested its increase. Since the argument in this proceeding the differential has been increased to 14 cents.[48] As the rate from Omaha is the combination on St. Louis to both Baltimore and New Orleans, and the rate from Kansas City is the same as from Omaha to Baltimore, and 1 cent less than from Omaha to New Orleans, the differential from Omaha is 14 cents and from Kansas City 15 cents.

Another important relation is between the rates from Omaha and Kansas City to Montreal and the Gulf. The present through charge to Montreal is approximately 31.5 cents, representing the combination of the proportional rate of 17.5 cents to Chicago and lake charges (including elevation and handling charges) of approximately 14

which territory came most of the Kansas shipments to the Gulf. This reduced export rate was first published by the Kansas City Southern over its direct route from Kansas City to Port Arthur, Tex., and was later participated in, or published over direct lines, by other carriers from Kansas City to New Orleans, Galveston, and other Texas ports. The relation of 1 cent over Kansas City is maintained from Omaha under present rates of 23.5 cents from Kansas City and 24.5 cents from Omaha.

[47] 18 cents to New Orleans and 25 cents to Baltimore. Chicago would restore the differential of 4 cents by rates of 15 cents to New Orleans and 19 cents to Baltimore, and would preserve the equalization of routes through Chicago and St. Louis from the Missouri River to Baltimore, by a reduction of 6 cents through Chicago to correspond to the 6-cent reduction through St. Louis, by reducing the rate from the Missouri River to Chicago 3 cents, and the rate from Chicago to Baltimore 3 cents. The request for the reduction of 3 cents from the Missouri River to Chicago has already been referred to in connection with the discussion of the proportional rate from Omaha to St. Louis.

[48] St. Louis to New Orleans 11 cents; St. Louis to Baltimore 25 cents. The former rate was voluntarily published by the Missouri Pacific and is the result of breaking the recently established rate of 24.5 cents from Omaha to New Orleans on St. Louis (13.5 cents to St. Louis and 11 cents beyond).

cents beyond. The present rates to Galveston and New Orleans are 24.5 cents from Omaha and 23.5 cents from Kansas City. The present through charge to Montreal is therefore higher than to Galveston and New Orleans by 7 cents from Omaha and 8 cents from Kansas City. Chicago and the lines from the Missouri River to Chicago complain that these differentials are too high to permit of competition of the Montreal route with the Gulf routes, and that they should not exceed 4 or 5 cents. Under the revision herein this relation will not be changed from Kansas City, due to a reduction of 2.5 cents both to Chicago (which is reflected in the through charge to Montreal) and to Galveston and New Orleans; but the differential from Omaha will be reduced to 2 cents, because of the change in the basis of rate from Omaha to the Gulf from 1 cent to 6 cents over Kansas City, that is, to the basis of the combination on Kansas City,[29] which is also the basis herein prescribed for domestic shipments.

The rate from Omaha and Kansas City to Baltimore is 38.5 cents, representing the combinations of 17.5 cents to Chicago and 21 cents beyond, and 13.5 cents to St. Louis and 25 cents beyond. The through charge of 31.5 cents to Montreal is therefore 7 cents less than to Baltimore. The revised through charge to Montreal, by reason of the reduction from 17.5 cents to 15 cents to Chicago, will be 29 cents. Reasonable export rates to Baltimore will be 31 cents from Omaha and Kansas City, 16 cents from Chicago, and 22 cents from St. Louis. The revised proportional rates to St. Louis are 9 cents from Kansas City and 13 cents from Omaha. The revised rate of 31 cents from Omaha and Kansas City to Baltimore will therefore break on Chicago from both Omaha and Kansas City, and on St. Louis from Kansas City. A reasonable rate from St. Louis to New Orleans will be 14 cents. The difference from St. Louis to New Orleans under Baltimore will therefore be reduced from 14 cents to 8 cents.

Another important export adjustment is from central Illinois. The rates from central Illinois are 11.5 cents to Chicago and St. Louis and 32.5 cents to Baltimore.[30] The rate from St. Louis to New Orleans is 11 cents. The through rate of 22.5 cents to New Orleans is therefore 10 cents less than to Baltimore. Chicago asks for a maximum difference of 8 cents. The revised rates will be the St. Louis combinations of 27.5 cents to Baltimore and 25.5 cents to New Orleans and will narrow the differential to New Orleans under Baltimore from 10 cents to 2 cents.

---

[29] Omaha and Kansas City to Chicago from 17.5 to 15 cents; Omaha to New Orleans from 24.5 to 27 cents; Kansas City to New Orleans 23.5 to 21 cents.

[30] The Chicago combination applied with transit at East St. Louis.

We find that present export rates are unreasonable to the extent they exceed the following:

	Present	Prescribed
Omaha to Montreal	31.5	See note.
Kansas City to Montreal	31.5	See note.
Omaha to Baltimore	38.5	31
Kansas City to Baltimore	38.5	31
Omaha to New Orleans	34.5	27
Kansas City to New Orleans	23.5	21
St. Louis to Baltimore	25	22
St. Louis to New Orleans	11	14
Chicago to Baltimore	21	16
Central Illinois to Baltimore	32.5	27.5
Central Illinois to New Orleans	22.5	25.5

NOTE.—The reduction from 17.5 cents to 15 cents herein made in the proportional rate from Kansas City and Omaha to Chicago will result in a reduction from 31.5 cents to 29 cents in the through charge from Kansas City and Omaha to Montreal.

EX-LAKE RATE FROM BUFFALO

A proposal of Chicago, Buffalo, Philadelphia, and Boston is a reduction of 3 cents in the export rate on ex-lake grain from Buffalo to eastern ports. The net rates from Buffalo (exclusive of elevation and storage) are 13.5 cents to Boston and New York and 13 cents to Philadelphia and Baltimore.

In 1926 80 per cent of the ex-lake grain from Buffalo to New York was Canadian grain shipped through Buffalo in bond. The carriers contend that we have no jurisdiction over shipments in bond; that a reduction in the ex-lake rate from Buffalo to New York would inure to the benefit of this grain and would be met by the Canadian rail-and-water routes and the New York State Barge Canal; and that the net result would be an advantage to the Canadian producer and a disadvantage to the American producer and the American rail lines.

We shall make no order in respect of these rates, but the carriers will be left free to establish any lower rates necessary in their discretion to enable these routes to compete with other export outlets.

BUFFALO-TOLEDO

Buffalo seeks a differential of 3 cents under Toledo and other western Lake Erie ports to Philadelphia and Baltimore, in lieu of the present equalization of all of these ports, in view of a lesser distance from Buffalo than from the other Lake Erie ports. The relative distances are not such as to warrant the granting of this request.

ATLANTIC PORT DIFFERENTIALS

Other issues affecting deliveries to ship side and port differentials at north Atlantic ports were recently passed upon in *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.*, 159 I. C. C. 691.

EXPORT RATES FROM MONTANA TO NORTH PACIFIC COAST

In 1922 the Great Northern, Northern Pacific, and Chicago, Milwaukee, St. Paul & Pacific (Milwaukee) established export rates 7 cents less than the domestic rates to Puget Sound and Columbia River ports from the western half of Montana, more specifically, from west of and including Burgoyne on the Milwaukee, Billings on the Northern Pacific, and Havre on the Great Northern, an important wheat-producing section on each of these lines. The Milwaukee had previously published export rates, which were canceled by the Director General of Railroads in 1918. The reasons for their establishment were said to be to afford a wider market to the Montana farmer, to furnish loading for westbound empty cars, and to furnish tonnage for export vessels of the United States Shipping Board operating out of these ports. These carriers now propose to cancel these rates, contending that conditions have changed since 1922, in that the farmer's condition has improved, there is no longer a car shortage on the Pacific coast, and the United States Shipping Board has disposed of its ships to private interests; also that a continuation of these export rates has become a menace to their entire northwestern adjustment, as evidenced by requests for similar rates from eastern Montana, from Idaho and North Dakota, and for the same level of rates eastbound to Minneapolis and Duluth.

In *Export Rates on Wheat and its Products*, 107 I. C. C. 276, tariffs proposing to cancel these export rates were found not justified in connection with a hearing in which the Great Northern and the Milwaukee declined to make any recommendation either for or against their retention, in view of conflicting claims of millers in Montana and Minnesota and of grain dealers at Minneapolis and Duluth, on the one hand, and millers and grain dealers at Puget Sound and Columbia River ports, on the other. The Northern Pacific asked for cancellation of the rates after their maintenance for three years, on the grounds that they had not helped the Montana farmer; that they had caused revenue losses not recouped by economy of operation from increased traffic; that the condition of the Montana farmer had so greatly improved as not to need the aid of the export rates; and that the Montana wheat is of a premium variety that would move as freely on domestic as on export rates. The three carriers

now propose the cancellation of these rates for these same general reasons.

Throughout all these hearings the cancellation of the export basis has been vigorously urged by milling interests in Montana and Minnesota, including interior mills, and by grain interests at Minneapolis and Duluth. Their general contentions have been that the Montana wheat is of too high a grade for manufacture into flour for export to the Orient; that Washington and Oregon wheat is substituted for the Montana wheat by the coast millers for shipment to the Orient, and the Montana wheat flour is sold in this country, to the disadvantage of their eastern competitors, in the amount of the export differential; and that the export rates increased from 8 to 15 cents the advantage in the delivering at Liverpool of Montana wheat milled at Seattle, over the same wheat milled at Minneapolis and shipped out through Duluth and the Atlantic ports. The Minnesota millers and grain dealers request that the export basis, if retained to Puget Sound and Columbia River ports, be established also eastbound, to permit of their competition with west-coast and Canadian mills and dealers in the export markets. In this proceeding request is made for an extension of this export basis from Sheridan, Wyo., on the Burlington, 142 miles east of Billings, and from southern Idaho, if the present basis is to be continued from the western half of Montana.

The west-coast millers vigorously deny the charge of substitution and urge in justification of the export rates that they have brought better wheat prices to the Montana farmer; that they are necessary to successful competition with Canadian mills, which grind wheat of the same high grade as the Montana wheat; that the eastern mills have the benefit of low export rates for that part of the haul from Buffalo and Chicago to the Atlantic seaboard; that the carriers have a large empty box-car movement from Montana to the west coast, which can be well utilized for the transportation of export grain; and that the conditions which gave rise to the export rates have not substantially changed, except that the Canadian competition through Vancouver for export has increased.

An important reason for the refusal to permit the cancellation of these rates, in the investigation and suspension proceeding mentioned, and the charging of the domestic rates which were there found not unreasonable, was the failure of the carriers to show substantial similarity of transportation conditions affecting the export and domestic movements. This record shows identical incidents of transportation of the two classes of shipments, as to equipment, routing, train movement, destination, terminal service, etc. The carrier does not know which is which. Any difference in service seems, in fact,

to favor the domestic traffic, which requires less clerical and policing service than the export shipments.

The comprehensive testimony on the subject, while conflicting, does not on the whole, establish that the Montana farmer gets any material benefit from these export rates.

For like distances the Montana export rates are from 10 to 35 per cent lower than the domestic rates from Idaho, Wyoming, Colorado, Kansas, Oklahoma, Texas, Nebraska, and South Dakota to Chicago, and are lower than the export rates to Galveston by approximately 35 per cent from Kansas, Nebraska, and Colorado, and by 20 per cent from Oklahoma.[51]

The rates herein prescribed are for application on both domestic and export shipments and will dispose of the issue now under discussion.

BARLEY FOR EXPORT THROUGH SAN FRANCISCO BAY PORTS

On San Francisco Bay, Port Costa is opposite South Vallejo and Oakland is opposite San Francisco. All four ports compete in the purchase and exportation of barley from the Sacramento Valley on the north and the San Joaquin Valley on the south. From both origin territories the rates to San Francisco and Oakland are the same, which is also usually true of Port Costa and South Vallejo. The rates to San Francisco and Oakland are from 0.5 cent to 1.5 cents higher than to Port Costa and South Vallejo for distances under 300 miles, and the same as to other ports for greater distances. From points on the Southern Pacific's coast division the rates to Oakland and San Francisco are lower than to Port Costa and South Vallejo. Exporters at San Francisco and Oakland ask that the differentials against them be removed in order to remove the present difficulty in their competing with the exporters at Port Costa and South Vallejo. They are willing in that event that all four ports be equalized from the Southern Pacific's coast division, which, however, is said to be a territory of light production. The exporters at Port Costa and South Vallejo say that San Francisco and Oakland exporters have a considerable advantage over them in the use of State-owned facilities.

The rates complained of were made to meet the competition of boat lines operating on the San Joaquin and Sacramento Rivers, which published higher rates to San Francisco and Oakland than to

[51] As of the period of this proceeding. They are approximately 15 per cent lower than present export rates to Galveston from Texas, Oklahoma, Kansas, Nebraska, and Colorado, under the recent reduction, already referred to, from Kansas, Nebraska, and Colorado to the basis then in effect from Oklahoma. These southwestern export rates are on approximately the same basis as the domestic rates from Montana to the north-coast ports.

Port Costa and South Vallejo. The San Joaquin River is no longer navigable beyond Tracy. The boat lines want no disturbance of the present relation by reductions to San Francisco and Oakland, because of the effect it would have on their revenues. They say that their service to San Francisco and Oakland costs more than to the other ports, and that a reduction to San Francisco and Oakland would make the rates so low as to make questionable their staying in the business. Port Costa and South Vallejo are served only by the Southern Pacific. San Francisco and Oakland are served by the Southern Pacific and other lines.

From the Sacramento Valley distances are to Oakland 26.9 miles greater than to Port Costa, and 24.4 miles greater than to South Vallejo. These are short-line mileages. Over routes actually used for operating reasons the differences are in some instances greater. From the San Joaquin Valley south of Tracy, Lathrop, and Stockton, via Peters, distances are to Oakland 14.1 miles greater than to Port Costa, and 24.2 miles less than to South Vallejo; to San Francisco generally greater than to Oakland; to Port Costa about 37 miles less than to South Vallejo; and to South Vallejo greater in all instances than to San Francisco and Oakland. Nevertheless South Vallejo is grouped with Port Costa, directly opposite, for competitive reasons, just as San Francisco and Oakland, opposite each other across the bay, are grouped for competitive reasons, but at rates higher than to Port Costa and South Vallejo.

The present adjustment to these four ports has existed for many years. On intrastate traffic it was prescribed by the California commission, largely because of boat-line competition. The carriers here do not desire to make the equalization, and thereby differ from the carriers to New Orleans and Seattle, which desire to equalize the rates to those ports with the rates to Galveston and Portland, for shorter mileages. The rates in Appendix D will be reasonable for this traffic.

FOURTH-SECTION RELIEF

No fourth-section applications were set for hearing with this investigation, nor did the carriers request additional relief in that respect. Some of our findings herein will, however, require additional fourth-section relief, and to take care of such situations the following approved in our report in *Consolidated Southwestern Cases*, 123 I. C. C. 203, page 403, is reaffirmed:

> Our findings herein will be understood to require establishment of the prescribed rates over the direct routes. The defendants may file applications for such relief from the long-and-short-haul provision of the fourth section as they may require in connection with the rates prescribed. In instances in which such applications are filed within 90 days after the date of service of this report consideration will be given to the entry of orders granting temporary

relief to aid establishment of the rates herein prescribed or approved and applying on the traffic embraced in such applications, and to maintain such rates until final action upon said applications.

AS TO OUTSTANDING ORDERS

Outstanding orders inconsistent with the findings and order herein will be modified accordingly.

REPARATION

Some of the complaints consolidated for hearing on this record ask for reparation. Other complaints were filed during the pendency of this proceeding and submitted, without separate hearing, for determination on this record, but with a reservation of the issue of reparation. The revision herein made is mainly of the relations of rates, in the removal of undue preferences and the promotion of uniformity of rate levels under substantially similar transportation conditions. The rates covered by these complaints have not been shown to have been inherently unreasonable, in the past, under section 1 of the interstate commerce act.

INTERSTATE VERSUS INTRASTATE LEVELS

An important issue is the relation between interstate and intrastate rates. The complaints of discrimination against interstate shippers have been numerous. The desirability of uniformity in rate levels in the same general territory, for both interstate and intrastate shipments, is apparent. Instead of any reasonable approach to this uniformity there is a wide disparity between not only interstate and intrastate levels, but between intrastate levels themselves, as the following table of rates for representative mileage blocks will show:

	100	200	300	400
Arkansas	14.5	20.5	23.5	23.5
Oklahoma	14.5	20	24	27.5
Texas	15	20	25	33
Kansas	12.5	19	20	23
Missouri	13.5	19.5	22.5	23.5
Iowa	12	16	20	24
Illinois	13	16.5	19.5	----
Wisconsin	15	20	20.5	23
Minnesota	13	14	16	17.5
Nebraska	16.5	22.5	25.5	27.5
South Dakota	[1] 13.5	19	24	27
Do	[2] 15.5	22	27.5	31
North Dakota	13	18	23	25.5
Montana	16.5	23.5	27.5	30.5
Wyoming	15	20	26	29
Idaho	19.5	24	28	29.5
Oregon	13.5	20.5	25.5	30.5
Washington, coast	13	18.5	24	[3] 26
Washington, interior	16.5	27.5	----	----
[illegible] scale	16	22	27	31

[1] East of Missouri River. [2] West of Missouri River. [3] For 350 miles.

It will be assumed that not only generally in the interest of substantial equality among all shippers, but in accordance with the cooperative agreement every effort will be made by the State commissions to achieve the maximum of uniformity in interstate and intrastate levels. Upon this assumption an opinion has been expressed herein upon certain of the intrastate adjustments in Oregon, California, Texas, and perhaps other States.

GENERAL COMMENT

From what has preceded, it must be obvious that this is an unusual proceeding. It embraces threescore and more of major issues, affecting every part of a vast territorial domain, each of which would ordinarily present a case of more than average importance and be treated in a separate report in the customary way. Detailed individual treatment of separate issues in this proceeding would result in a report encyclopedic in size, far beyond the limits of practicability, and require many months of additional time. As a practical matter it has therefore been impossible to discuss all of the facts bearing upon each issue. However, huge as this record is, thorough examination has been made not only of the immediate transcript of some 53,000 pages, but also of the 2,100 exhibits and approximately 20,000 pages of briefs, exceptions, oral argument, and final memorandums.

As previously stated, the greater part of the evidence and the chief contentions centered around wheat. In some respects, in a traffic sense, wheat is the most liquid commodity known in transportation. The classes or grades of wheat have long been standardized and, commercially, wheat approximates currency. The rate structure should permit it to move freely in all directions. Rates on wheat are closely related to one another, and even a slight change in one will ordinarily affect the movement governed by the others. In fact, generally speaking, all the rates on wheat may be likened to a huge blanket covering the entire country, and a pull on any part of this blanket to the extent of 1 or 2 cents, sometimes even a fraction of a cent, will be felt in every other part.

The action here taken represents the fullest possible response to all the mandates of the law affecting, among other things, the important subjects of levels and relations of rates, the natural and proper development of the country as a whole, and the maintenance of an adequate system of transportation. The future volume of movement of wheat and other grains between specific points can not be accurately known. It follows that the revenue effects of the increases and decreases which will follow the effectiveness of our

action herein can not be precisely stated. We have made many different checks and estimates. While the reductions far exceed the increases, and the corresponding revenue effects will be substantial, the full effect upon revenues can not be adequately foretold, in view of the limitations upon transit, the elimination of transit balances outbound from primary markets, and the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates. We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation. We say this especially in the light of increased revenues already granted in certain other cases, and in the realization that a failure of the present revision to afford adequate revenues will prompt further proceedings.

It would be impossible to take any comprehensive action without adversely affecting certain of the conflicting interests upon this record. Nothing but experience can demonstrate what the effect will be regarding certain of these issues. We therefore invoke the aid of carriers in establishing the rates herein prescribed with the greatest possible expedition in order that this new rate structure may receive a speedy test. All parties should cooperate to make careful note of the effect upon their interests, with the view to bringing to our attention from time to time, after a reasonable trial, those situations which may require further consideration.

An appropriate order will be entered.

McMANAMY, *Chairman*, concurring:

In general, I concur with the conclusions here reached because I believe they will bring about a substantial improvement in the existing grain-rate structure in the western district. The rates here established will afford a measure of relief to some of the products of agriculture and are not unjust to the railroads because the record in this case conclusively shows that wheat has been bearing more than its share of the transportation burden. I disagree with the conclusions in certain particulars, the most important of which, briefly stated, are as follows:

Coarse grains.—For many years what are known as coarse grains—that is, corn, oats, rye, and barley—have moved on a percentage of the wheat rates. The chief justification for this has been the lower value of such grains. It is here proposed to require coarse grains to move at the wheat rate. This results in actual and substantial increases over the present rates from many important producing points. I find it difficult to justify this change. I think the differential under wheat for the transportation of coarse grains should be continued.

Transit.—The report allows but two so-called free transits plus one inspection stop, which substantially improves existing conditions in the Middle and Southwestern States, where the number of free-transit stops has been unlimited. It is a backward step in the Northwestern States, where transit services have been separately charged for, because it increases the rate by including therein the cost of a service which the grower does not ordinarily want or use, yet under the rules here established is required to pay for.

There can be no such thing as free transit. It is a service which at 2 cents per 100 pounds costs on the average approximately $20 per car to perform and which must be paid for by some one. To the person for whom it is performed it is a valuable service for which the carrier is entitled to compensation. It includes ordinarily two complete terminal services at each transit point. That is, it involves, first, placing the loaded car at an elevator, mill, or warehouse for unloading; second, switching out the empty car; third, placing another empty car for loading when the shipment is again ready to go forward; and fourth, switching out the load and putting it in the train. Exact cost to the railroads of transit service on grain is not available, but the total is estimated to be approximately $30,000,000 per annum in the territory covered by this report. My own view, for which I find support in the record, is that a very small percentage of this is performed for or desired by the actual producer of grain. It is no doubt a very essential part of the process of marketing and milling the grain, and the reshipment of grain products, but those who desire and use it should pay for it. Under no circumstances should the cost of transit be included in the grain rates where it must be borne pro rata by all shippers regardless of whether or not they desire it or use it. With a reasonable charge for this so-called free service it would be possible to give the actual grower of grain lower rates without depleting the carriers' revenues and that I understand to be the primary object sought in this proceeding.

Markets.—I disagree with the theory that certain markets, here designated as primary markets, are entitled to a more favorable adjustment of freight rates than other markets not so designated. The principal distinguishing feature of the so-called primary markets, so far as I can determine, is the fact that they are what are known as "futures markets," that is, markets which make a business of buying and selling futures grain for a rise or fall in price. To my mind that distinction does not entitle such markets to a more favorable adjustment of freight rates than is given ordinary markets which simply buy and sell grain for a merchandising and storage profit but

do not traffic in futures, and I know of no provision of the act which gives us the authority to make such a distinction.

Export rates.—The real problem of the wheat grower is the disposal of the surplus that is grown which can not be consumed in this country. This surplus approximates 200,000,000 bushels per annum. If it is to be disposed of in foreign markets it must meet the competition of grain grown in other countries which may be and often is both grown and transported at a lower cost. The freight rates on grain for export becomes, therefore, an important factor in connection with its sale. Rates to the ports on commodities for export lower than domestic rates on the same commodities are an established part of our rate structure. Iron and steel articles, automobiles, coal, farm machinery, and many other commodities enjoy such rates and we have repeatedly justified them on the ground that transportation services to the ports are different and less expensive on commodities for export than on similar commodities for local consumption. To the extent that transportation conditions warrant, export rates lower than domestic rates on grain and grain products should be provided to aid in the disposal of the surplus which is depressing our home markets.

MEYER, *Commissioner*, concurring:

It seems to be generally understood that the large task directed by the resolution is the reconstruction of the rate structure of the country. I do not understand that this direction has been affected by the recent decision of the Supreme Court of the United States in the California Fruit Case, — U. S. —, decided June 2, 1930. We are also directed to remove discriminations against the various classes of traffic, commodities, localities, and parts of the country. This report is our answer to those directions with respect to grain and grain products.

The record in this case for the first time presents a complete view of the existing grain rates in western territory and places before us facts upon which a revision may be attempted. As the commissioner in immediate charge of this proceeding, I wish to thank the many contributors to this record. Without their cooperation our task would have been impossible.

The report sets up a revised grain-rate structure which I believe experience will demonstrate to be an improvement over that which now exists. The new structure is not a glorified distance scale nor a symmetrical geometrical figure. It is a system of functionally related rates which fit the grain business as described in this record.

The rates prescribed lie within the zone of reasonableness, but they are the lowest rates on this traffic which can be lawfully prescribed.

The failure of the report to authorize or permit the equalization of ports in connection with export traffic is, in my judgment, not sound. I shall not discuss port equalization on domestic traffic. To my mind the weight of the evidence is strongly in favor of permissible port equalization. This was quite generally admitted even on the part of witnesses who spoke for the nearer ports. Apprehension was expressed by some of them that equalization might result in a higher rate than would otherwise be imposed on the nearer port. With the assurance that the rate to the nearest port would be made as low as possible, based on transportation conditions to that port, there was almost no testimony on the part of witnesses who testified on that subject in opposition to voluntary equalization. The general consensus of opinion was to the effect that carriers should be left free to equalize the respective ports to the extent that they may find necessary in the conduct of their business. Here I am speaking almost exclusively of wheat because wheat is the only grain that presents a large export problem, which other grains do not present. Carriers should be given the greatest possible liberty to deal with export situations as they arise. Equalization is one of the important factors in such situations. This applies to lake as well as to Gulf and ocean ports.

The suggestion is made that coarse grains should continue to take rates that are 90 per cent of the wheat rates as revised herein. One pertinent reply is that such a basis of rates would fall below the zone of reasonableness and would take from the carriers many additional millions of dollars which can not fairly and lawfully be taken. A reduction of the coarse-grain rates to the same extent that wheat rates are reduced herein would be disastrous to some important carriers. Certain of the heavy, coarse grain territories have enjoyed unduly low rates while other areas of equal importance have borne rates that are too high. This is demonstrated by the large reductions which result from our action herein in the coarse-grain rates of South Dakota, Nebraska, and Kansas. To bring both to the common level of the reduced rates on wheat by increasing one and lowering the other is an act of justice under the law and not a proper foundation for an imputation of vacillation on the part of the commission. To continue the 90 per cent basis for coarse grains would require a correspondingly higher basis for rates on wheat for which there is no justification, not to mention the admitted discriminations which such a conclusion would continue.

I am quite content to let Des Moines continue to experiment with proportional rates as provided in the report. They do not appear to have done that market any particular good nor do they seem to have done other localities substantial harm, although, when established as

in this instance, they are troublesome as part of a properly balanced rate structure. Further experience should be valuable in throwing light on the relation of the rate structure to the location and development of markets. Basic economic forces determine the location of price-registering primary markets. *Helena Traffic Bureau* v. *M. P. R. R. Co.*, 89 I. C. C. 405, at pages 415 and 416. These locations are facts to be considered like the location of the grain fields themselves, not the result of caprice or of the form of a rate structure, as some contend. The denial of this fundamental fact has been a strange feature of this proceeding which asserted itself periodically with cynical persistence from beginning to end. The grain fields and the price-registering markets are among the fundamental facts to be considered in the creation of a grain-rate structure, coordinate with the location of milling centers, areas of consumption, and ports of export. The record in this case is conclusive on that subject.

As was so clearly said in the *Helena case*, points on the banks of rivers or lakes in this country which are now accorded a rate-breaking arrangement have it because they play an important part in some industry as a whole, or because the force of competition has gradually brought about such an adjustment and that as grain is now marketed in this country the existence of primary markets at such important gateways as Omaha, Kansas City, St. Louis, and Chicago, with great storage facilities, is almost an economic necessity, and rates are properly made to meet these existing conditions. The rate break herein prescribed will not, as some seem to think, unduly favor primary markets, since the outbound proportionals represent averages of the transit balances of through rates prescribed via interior transit points. In fact, if any advantage accrues under this system, it will be at interior transit points which will still be free to select the most favorable transit balances, whereas the markets will be compelled to operate exclusively on their proportionals, where such exist.

The amount of grain which receives transit services can not be definitely stated for the reason that the facts necessary for an accurate statement are not available. The record seems to warrant the assumption that about one-half of the grain transported receives one or more transit services, even under existing regulations and practices.

As a result of this proceeding the number of transit services under the rate on any shipment of grain is limited to a maximum of two. This is very different from the assumption, mistakenly indulged in, that the rates herein prescribed provide for two transits on all shipments. In fact, they provide for a maximum of two transits on such grain as may be transited, knowing that one-half or less than one

half of the grain transported receives transit. I find no warrant in the record for the further assumption that the proportion of nontransit grain is substantially greater in export than in domestic traffic, particularly since about one-third of our grain exports is in the form of flour. This flour must be milled somewhere, which means transit. Not a large proportion is milled at the ports of export. Assuming that the nontransit proportion is somewhat larger in the case of export than domestic, such difference as may exist in this respect falls far short of justifying the proposed difference of 10 or 15 per cent in the rates.

The suggestion that all grain rates should be put on a higher level in order that export rates may be required to be placed on a lower level, it seems to me answers itself. Why should the producers of 600,000,000 bushels subsidize the producers of 200,000,000 bushels? About one year ago the carriers, in a commendable attempt to aid in a national program to diminish the surplus supply of wheat in this country, voluntarily established emergency export rates on a basis substantially lower than any rates theretofore prescribed by us. While the results of this experiment have not been subjected to the clarifying test of examination and cross-examination on a public record in a proceeding before us, and therefore the facts are not available here, it is my understanding that the emergency export rates produced no appreciable effect in moving wheat out of the country. But even if they had produced the desired effect we would still be without power to compel the railroads to publish them unless the rates fell within the zone of reasonableness. It is my understanding that many of these rates were established on a level below that zone. Whatever the facts may be in this regard, we are establishing herein rates as low as we can lawfully prescribe. Having done this, on what basis of law and equity can we compel the carriers to apply still lower rates? If they voluntarily wish to do so as an aid in the exportation of wheat, we may grant such authority as we granted in connection with the emergency export rates last year. To illustrate, if the carriers, in an effort to aid in the exportation of wheat, should apply to us for authority to publish on short notice a postage-stamp rate on export wheat, I would probably vote to grant that authority, depending upon the weight of the representations made; yet, while there can be no doubt regarding our power to prescribe export rates, we are utterly without power to force carriers to publish a postage-stamp rate under present conditions. Furthermore, who would receive the benefit of lower export rates, if published, is a much debated question in this record. It is clear, however, that frequently, if not generally, the producer of the grain derives little or no benefit from them.

I have already pointed out that alleged differences in transit services could not justify the lower export rates proposed. It is further suggested that loading of export grain is heavier than domestic. The record shows that the average loading of wheat in the western district is in the neighborhood of 41 tons. The general tariff rule is the prescribed minimum of the marked capacity of the car. The limitations of the commercial unit on flour, for instance, find no application to the grain and if the marked capacity of the car which operating officials of the carriers have applied with practical unanimity in the transportation of the grain is too low, the minimum should be increased to something higher and applied on both domestic and export traffic. There is no basis in this record to justify an order to that effect. The point I wish especially to emphasize in this connection is that heavy loading is not an attribute of export grain shipments alone and can not therefore be ground for a decisive argument from a cost standpoint in support of lower export than domestic rates when the domestic rates have been fixed on the lowest lawful basis. Nor can the arguments based on trainload shipments be given substantial weight. It is not a fact that a large proportion of export grain moves in trainload quantities. In fact, trainload movements on all grain are the exception. And when it is attempted to attach weight to a theory of lower costs when a larger proportion of the cars in a train are loaded with grain, it is only necessary to point out that cars require certain handling in making up trains, irrespective of their contents. These costs, therefore, do not vary with the character of the contents; nor do variations in costs occur after the cars have begun to move as a part of the train. In other words, the alleged lower costs on export as compared with domestic grain find little if any substantial support when the business as a whole is considered and assuredly, whatever differences there may be as between domestic and export grain, such differences are probably no greater than differences that could be suggested as a result of refinements in calculations relating to any other important class of traffic. As I understand this record, there would be no justification for an order requiring the carriers to apply export rates lower than the rates which we have prescribed herein on all grain.

There is definite evidence in this record showing the proportion of grain which originates on branch lines in specified territories and on designated railroads. I shall not reproduce those figures here. But there is no basis for the assertion that export traffic is main-line movement and domestic traffic is branch-line movement.

Another peculiar fallacy appears to have found its way into arguments relating to export grain. It seems to be assumed on the part of many that surplus wheat is a definite quantity which can be

drawn off at one time like an excess of water from a teakettle. When the excess has thus been drawn off, it is argued, the country will be placed on a domestic basis, which is supposed to mean a higher price. Those producers who have not sold their grain will then get this higher price, it is said. Where these philanthropic producers are to be found who will remove the surplus by rushing their wheat out of the country early in the season at the lower export price in order that other producers may later realize the higher domestic price has not been explained. The weight of the evidence does not support this naive theory.

To the extent that export rates tend to accumulate unsold grain at the ports they tend to depress the price. The evidence shows that the "position" of unsold grain is of paramount importance. Unsold grain accumulated at a port is "at the mercy of the exporters." This is so well understood by competent grain merchants that they cease buying when their accumulations in excess of sales reach stated limits at a given port. The evidence on this point is conclusive. Not so with the great interior grain markets. There grain may be accumulated in unlimited quantities, limited only by facilities, because that grain, unlike grain "in the show window" at a port of export, is in a strategic position, where it may receive the benefit of every favorable development and can generally be moved commercially in several different directions. As pointed out in the report, considerations like these must be given proper weight in a grain-rate structure.

It is suggested that our finding as to reparation is summary and utterly inadequate in that there is no discussion or weighing of the evidence as bearing upon particular complaints which seek reparation, and that such complaints are not even enumerated in the report.

All complaints disposed of in connection with this proceeding, together with a summary of the issues in each, are shown in Appendix A. Only 7 of the 40 cases included therein seek reparation. Two of these, Nos. 20474 and 21079, were heard on this record and are discussed in the report. At the hearing the claim for reparation in No. 21079 was withdrawn. Of the other five, four cover rate adjustments between points in the Southwest, one from Kansas and Oklahoma to New Mexico, one from New Mexico to Texas, one from Texas to Galveston, and one from Oklahoma to points in Arkansas on the Missouri & North Arkansas Railway. The other relates to transit at Minneapolis. The rates assailed in each of these complaints are a part of the general revision of grain rates required herein, and our disposal of the issues as to reparation is in harmony with our recent findings in *Western Trunk-Line Class Rates*, 164 I. C. C. 1, at page 217, where we denied reparation in a number of complaints without specifically detailing the allegations and evidence

adduced in each complaint other than as listed in an appendix to that report. It is also in harmony with the general discussion of the numerous issues presented upon this record.

EASTMAN, *Commissioner*, concurring in part:

Although it contains much with which I am not in accord, I have joined in the adoption of the report in this proceeding because it will, on the whole, improve the existing situation, and such a report as I would prefer can not be adopted. I know, also, that the commissioner and his assistants who have been in immediate charge of the proceedings have had an extraordinarily difficult task, and the report is the product of sincere and devoted endeavor on their part to find the right answers to the highly controversial questions which have been put them on every side. Moreover, the matters upon which I disagree with their conclusions are not one-sided. The difference of opinion is not so much one of principle as it is one of the weight to be given to established custom. But while I have, for these reasons, cast my vote for the report, I think that it may be helpful for me to tell why I would have preferred certain different conclusions.

The rates in issue are on grain and grain products. That grain agriculture is depressed admits, I believe, of no doubt. Respondents contend to the contrary, but it is inconceivable that the cries of distress which have risen from the western land are wholly, or even largely, fictitious. The evidence warrants no such conclusion. This depression is a fact to be taken into consideration along with other pertinent facts, in determining what rates are reasonable. The extent to which the farmer will benefit from reductions is uncertain. He may, and probably will, be helped a little, but it will not go far to solve the agricultural problem. That, however, lies beyond our province.

In determining what are the "lowest possible lawful rates" we must first decide what services the rates are to cover. This raises three important questions:

1. Whether the rates should be the same on all kinds of grain.
2. Whether they should be the same on grain and grain products.
3. Whether or not a separate charge should be made for transit service.

Coarse grains.—In western territory east of the Rocky Mountains, excluding Illinois, the rates on coarse grains are now 10 per cent less than the wheat rates. West of the Rocky Mountains the rates are the same, as they are in the East and the South and in Illinois. Rates on flaxseed are generally about 12 per cent higher than the rates on wheat. During Federal control the rates on coarse grain were uniformly made the same as on wheat, and this was approved

by division 2 in *National Council Farmers' Asso.* v. *Director General*, 56 I. C. C. 399. I quote the following from pages 408–409:

> It is shown by defendants, and not successfully contradicted, that conditions surrounding the transportation of coarse grain are substantially similar to those involved in the transportation of wheat but that wheat loads more heavily than does coarse grain. The fact that coarse grain is less valuable than wheat does not of itself establish the propriety of lower rates on coarse grain than on wheat. There has been no definitely established relationship as between the rates on coarse grain and those on wheat.

Subsequently, in *Rates on Grain, Grain Products, and Hay*, 64 I. C. C. 85, a 10 per cent difference in favor of coarse grains was required in all of western territory. At page 100 we said:

> This finding is not in harmony with that in *National Council Farmers Asso.* v. *Director General*, *supra*, but is based upon the present record, which shows a present different relationship of value between wheat and coarse grains than was developed in the cases mentioned, and refers to a normal condition.

In a report upon further hearing, 69 I. C. C. 562, rates in Illinois territory were released from this finding, because, among other things, it would result in the "projection into the eastern and southeastern territories of two sets of rates, applicable on wheat and on coarse grains, in lieu of one set as at present." In a third report, 80 I. C. C. 362, the finding was vacated as to Mountain-Pacific territory, largely because a parity of rates on wheat and coarse grains had been the custom in that territory, and the record indicated "that this common basis was generally acquiesced in by producers and shippers, and no complaints to the carriers or rate-making bodies are disclosed as having been made."

The record here shows, substantially without dispute, that the unit cost of hauling coarse grains is somewhat greater than the cost of hauling wheat, chiefly because of the lighter loading of the coarse grains. The latter have a lower value than wheat; but it seems to me that in view of the depression from which the producers of both kinds of grain are suffering, and the importance of the rates to the producers, the element of value will be given all the weight that it can properly be given under the circumstances, if coarse grains, with a somewhat higher transportation cost, are accorded the same rates as wheat. In other words, I do not believe that we are justified in imposing a burden upon wheat, which is what lower rates for coarse grains would involve, for the sake of granting a concession to the latter. The same reasoning would preclude higher rates for flaxseed, since there is no proof that it costs more to haul flaxseed than wheat. However, it seems that the shippers would generally acquiesce in a uniform differential of 2 cents over wheat, and this seems a fair compromise.

Transit.—At the present time so-called free transit service is accorded grain and grain products in western territory, except on the northern lines between Minneapolis and the Pacific coast. Separate charges for such service are made on those lines and also in the East and South. From a transportation point of view, beyond question a separate charge should be made. We have frequently found that "transit is a thing of value to the shipper, involving additional service on the part of the carrier, for which a reasonable charge may be made." As was well said in *Mercantile Lumber Co.* v. *I. C. R. R. Co.*, 53 I. C. C. 663, 666:

> Transit involves a service rendered to those making use of it, and the cost should be borne by them instead of by the shipping public generally. There can be no question but that defendants may exact a reasonable charge for the extra service they perform where a shipper takes advantage of a transit arrangement. It is a thing of value to the shipper and of expense to the carrier.

There is, of course, no actual "free" transit service. It is not the intent of the carriers to give anything away. Either there must be a separate charge or the cost of the service must be included in fixing the level of the line-haul rates. The objection to the latter plan is that transit is not always an incident of the line haul. At times this service may be furnished, not infrequently at a number of points en route, but at other times it is not furnished. Whoever pays the freight, whether he be the farmer, the middleman, or the consumer, ought not to be required to pay for a service which he does not seek or receive. The cost of transit service, as stated in the case above cited should plainly be borne by those who make use of it.

This principle is recognized on most other traffic. There is generally a separate charge for transit, although it may not be fully compensatory. And in theory the principle is conceded here. The failure to make a separate charge is defended on two grounds: (1) Expediency, i. e., that it has been the custom, on which millers and dealers have relied, and that a change in this custom would cause disaster to establish industry; and (2) equality of privilege, i. e., assuming no charge would be made for stoppage at a rate-break point, that undue preference of the millers and dealers located at such points can only be avoided by "free" transit at other points. I shall discuss this defense a little later.

It is also conceded of record that there have been extensive and extraordinary abuses in transit service, arising chiefly from the competition of carriers for traffic, particularly those with indirect routes. After leaving the farm, grain may be "transited" several times before it reaches the final destination in the form of some manufactured grain produce, which may even be a neatly packaged cereal breakfast food. And in the course of this oft-interrupted journey,

it may wander about the country in serpentine fashion. Illustrations are given in the majority report. There may be actual back hauls of many miles. All this is done for the same rate as would be charged if the grain were hauled by a direct route without stop from origin to destination. At times the carrier which hauls the traffic from the transit point, instead of receiving compensation, finds that it has to pay for the privilege. This abuse of transit is especially characteristic of the Southwest, and is urged by the carriers of that region as a compelling reason why their grain rates should be relatively high. The report which we have adopted does something to curb the abuse, by finding that the number of stops in transit should be limited to two, in addition to one stop for official inspection. But inasmuch as every stop in transit involves a terminal service when the grain or grain product, as the case may be, is delivered to the mill, elevator, or other storage point, and another when it moves out, even this means that the through rate may have to cover six separate terminal services. Obviously this makes it necessary to inflate the line-haul rates, without regard to unduly circuitous hauls and other forms of abuse which are not curtailed.

Transit charges on the northern lines vary from 1.5 to 2.5 cents per 100 pounds. On this record I think that a reasonable charge could properly be fixed at 2 cents per 100 pounds. This may not fully cover the additional expense involved, but the record is not clear on this. The charge should be made wherever there is a stop in transit requiring the unloading and reloading of cars and additional service by the carriers, and whether or not the point is a rate-break point. This would include a stop for milling when the grain is moved out of storage to a mill in the same switching limits. In my opinion the charge should even be made at ports, in connection with a through movement, provided the stop involves additional service by the carriers or the commodity which moves by water is not the same as that which reaches or leaves the port by rail. Provision at ports for such a charge, or its equivalent, might require some ingenuity, but I am confident that the problem could be worked out. One stop for official inspection should, however, be covered by the line-haul rate, for such a stop seems to be a necessary incident to the movement of the grain. Ordinarily, also, it requires little extra service on the part of the carriers. Additional charges should be levied for out-of-line and back-haul movements in connection with transit service. What such charges should be I am unable upon this record to say. Their level could be left to the initiative of the carriers, subject to possible suspension and further investigation.

Grain products.—The general practice in the western district is to charge the same rates on grain products as on the grain out of which

they are made. Thus, wheat flour takes wheat rates, and corn meal takes corn rates. In some instances, however, bran, shorts, and middlings, which are by-products of wheat, are accorded the lower rates on coarse grains. The exceptions to this general practice are that flour is generally charged higher rates than wheat from the territory east of the Rockies to destinations in the Mountain-Pacific group, and to a considerable extent within that group. Until quite recently, also, higher rates were charged on flour to Texas destinations. In the East that is the normal practice, and it also prevails to a considerable extent within the South. Within the western district, it also appears that the grain rates are not infrequently charged on such grain products as prepared and packaged breakfast foods.

The record shows without dispute that it costs considerably more, probably in the neighborhood of 25 per cent, to transport grain products than wheat. In general the grain products are also of materially higher value. Judged by customary rate-making standards, they clearly should take higher rates than wheat. The parity in rates with grain is defended solely on grounds of expediency. It is urged that mills have been established in the grain-growing country in reliance on this custom; that their presence there is of aid to the farmers; and that they would be forced to move if rates higher than the grain rates were charged on flour and meal. I shall advert to this argument later.

In my judgment the primary grain products should take rates 10 per cent higher than the rates on grain, and where there is milling in transit the final rate applied should be the rate on grain products from the origin of the grain to ultimate destination. Specially prepared flours or breakfast foods should take even higher rates.

On the three points, therefore, my conclusions are that coarse grains and wheat should take the same rates; that a separate charge of 2 cents per 100 pounds should be made for every stop in transit, except one stop for official inspection, and additional charges levied for out-of-line and back hauls; and that primary grain products should take rates 10 per cent higher than the rates on grain. It should be noted that if coarse grain is to have rates lower than wheat, if transit is to be "free," and if grain products are to have the same rates as grain, it becomes necessary, in determining the level of the rates in different parts of the western district, to consider not only differences in ordinary transportation conditions but also differences in the extent to which coarse grains move as compared with wheat and flaxseed, in the amount and character of "free" transit service furnished, and in the extent to which grain products move as compared with grain. These are differences which

affect the level of the rates which may properly be prescribed and which are quite as important and controlling as differences in ordinary transportation conditions. I doubt whether they have been sufficiently considered in the report adopted.

The influence of these factors was pointed out in *Grain and Grain Products*, 122 I. C. C. 235, 254–255. It was there shown that in 1924 the earnings of the Great Northern on grain and grain products averaged 9.71 mills per ton-mile and 37.52 cents per car-mile for an average haul of 355.5 miles, whereas those of the Rock Island averaged 8.62 mills per ton-mile and 28.62 cents per car-mile for a shorter average haul of 284.9 miles. These figures, and others like them, were made a part of the record herein and were in no way controverted. Yet it was shown in the former case that 82 per cent of the Great Northern's grain originates east of the Montana-North Dakota line, so that its earnings on this traffic are derived chiefly from rates which the carriers contend are relatively low. The Rock Island, on the other hand, is a typical grain carrier operating in western trunk-line and southwestern territories, and in the latter territory, at least, the rates are relatively high. Undoubtedly the more favorable earnings of the Great Northern, which are even more favorable than they seem on their face, if due consideration be given to average length of haul, result from the fact that it hauls very largely wheat and flaxseed, with little "free" transit service, whereas the Rock Island operates in territory where coarse grains and grain products constitute a much larger proportion of the traffic, and where "free" transit service is accorded most liberally.

Situation of the mills.—I come now to the considerations of expediency which are urged upon us by the millers and dealers. Regarded from one point of view and stated baldly, what they urge is that we fix rates artificially, in disregard of transportation costs, for the purpose of encouraging forms of industry in certain regions in preference to other regions. In my opinion we have been and could be given no such function by Congress. Reference is made to the fact that in the Hoch-Smith resolution we are directed, in making changes, adjustments, and redistribution of rates, to give due regard "to a natural and proper development of the country as a whole." But no development of the country is "natural and proper," as I see it, which rests upon an artificial manipulation of rates in disregard of the costs of transportation. We are also enjoined in that resolution to adjust rates "to the end that commodities may freely move." But this does not mean, I believe, that commodities must freely move from any and all points regardless of geographic and other natural conditions. From another point of view, however,

what these interests are urging is that we give controlling weight, in fixing the rates, to long-established custom. This is a more debatable proposition. I think that we may give such custom *some* weight, but by no means controlling weight. Even some weight is of doubtful propriety, in view of *So. Pacific Co.* v. *Interstate Comm. Comm.*, 219 U. S. 433.

In this proceeding the millers, dealers, and markets have consumed more time and record space than any other interests. One reason for their activity is indicated by the following extracts from a brief filed by an association of millers:

> The combined capacity of all the flour mills in the eastern and western districts approximates 984,610 barrels of flour daily, or a potential capacity of 295,383,000 barrels of flour per year, which is nearly three times the domestic consumption of the United States.
>
> The Department of Agriculture of the United States, in its 1926 report, points out that the per capita consumption of wheat flour in the United States has declined more than 20 per cent during the past 40 years. In 1879 the annual consumption of wheat flour was equivalent to 5.6 bushels of wheat per person. Since 1919 it has been approximately 4.25 bushels. The per capita consumption is about 16 per cent below what it was before the war, and 24 per cent below that of 1879.

These statements reflect an overexpansion of the milling industry, combined with a relatively falling demand, which must occasion the keenest competition and prevent abundant prosperity. No doubt a similar situation exists among the dealers and markets.

Throughout the record and upon argument the millers, dealers, and markets, while conceding their selfish interest in the rates, have endeavored to show that their activities and their various rate privileges, such as "free" transit and rate breaks and the parity of flour and wheat rates, all operate to the advantage of the farmer and result in a better price for his product than he would otherwise obtain. It has at times been difficult to understand how the farmer, with all these friends working zealously in his behalf, can yet be in a state of depression. There is a tendency, also, to personify the market. A great market place, like Kansas City or Minneapolis, is apparently thought of as a single buyer, and there is fear that the producer of grain will be in the grasp of a monopoly unless he is able to reach at least two markets at equal freight rates. As a matter of fact a market is the trading place of a great many competitive buyers and sellers, and also buyers at different markets may often compete in the same producing area without an equality of freight rates therefrom. Thus Chicago buyers compete with Minneapolis buyers in South Dakota and St. Louis buyers with Omaha buyers in Nebraska. Many other illustrations could be given. Some of the great milling companies buy in most of the markets and direct from the producer

as well. In the early crop-moving season Minneapolis buyers have been known to go as far south for grain as Texas and buy there in competition with near-by mills. And whether the flour mills stay where they are or change their location, the ultimate consumers will remain to be fed and there will be the same demand for the various kinds and grades of grain for milling purposes.

While I am no expert on the subject, my impression, for what it may be worth, is that it is highly important to the farmer in marketing his grain that all unnecessary waste and duplication in the process of distribution between the farm and the ultimate consumer be eliminated; and certainly much unnecessary waste in transportation now exists and is so much dead weight which the freight rates must carry. I confess, also, that I am unable to see how the much vaunted "futures" markets can in the long run enhance the cash price of grain, any more than a man can lift himself by his boot straps, although these markets, due to their speculative possibilities, may cause temporary fluctuations in the cash price both up and down. Finally, in addition to the elimination of waste in distribution, I am strongly inclined to believe that, to ensure the best price for their product proper cooperation among the farmers themselves is far more important than such matters as the "pulls" of competing market places, of which we have heard so much. But these reflections trespass on the function of the Farm Board.

While I believe that it has no place in the determination of the reasonable rates, it may be well, however, to consider briefly the contention of the mills in the grain country that if flour were given a differential over wheat and if a separate charge were made for transit, they would be obliged to move to the East, and some say to the Atlantic seaboard. This contention was made over and over again on the record and in argument, but in general it was characterized by an absence of discussion of the economic factors affecting the situation. Reliance was placed on strong assertion, and the appeal was to sentiment rather than to economics.

Let us consider, first, the question of a flour differential. In order to determine whether or not such a differential would cause these mills to move, it is necessary to have knowledge of such conditions as these in every part of the country: (1) The prevailing wages and efficiency of mill hands; (2) the cost of power—water, steam, or electric; (3) the level of land values and rents; (4) the consumption of both grain products and by-products. The record contains very little information upon the first three points, but it does contain some information on the fourth. In 1925, it appears that 45,260,800 barrels of flour were consumed in the western district and 62,836,600 barrels in the East and South. It must be obvious that there would

under no circumstances be economy in moving mills to the East for the purpose of producing the flour consumed in the West. In 1925, however, 34,232,600 more barrels were produced in the West than were consumed, whereas in the East and South production fell short of consumption by 28,174,000 barrels.[1] The question is whether, if there were a flour differential, it would be economy to increase the production in the East and lessen the production in the West.

In considering this question it must be borne in mind that to produce a barrel of flour, weighing 196 pounds, 4.5 bushels of wheat, weighing 270 pounds, are necessary, the remainder taking the form of bran, shorts, and middlings, with a small percentage of sheer waste. In order to produce a barrel of flour on the Atlantic seaboard, therefore, 74 excess pounds of freight must be shipped. Whether or not this will be a wasteful thing to do depends in part upon the market for the by-products. Obviously there will be a waste if they have to be shipped back into the interior. The record contains no statistics showing the consumption of by-products by States or regions, but they are mostly fed to stock, and it seems a safe conclusion that there is greater consumption in the West than in the East and South. At all events there is certainly little consumption, relatively, on the seaboard, so that back hauls into the interior would be necessary in the case of the bulk of the by-products, and probably the average back haul would be of very considerable length.

Not only that, but a mill at the seaboard would find back hauls on the flour necessary to reach all markets except those immediately at the seaboard; and in selling flour even to bakeries and dealers located within the same switching district, it would be necessary to pay switching charges which would probably be absorbed in the case of flour shipped from the West. The fact is that the seaboard is not now and never will be a favorable location for a flour mill, except, perhaps, with respect to export flour. The demand for that is at best not much more than 10 per cent of the domestic demand, and it is irregular, so that it is not good business for a mill to limit itself wholly to the production of export flour. It must be evident that the most favorable location for a mill is where a large part of its market lies beyond it, in line with the movement of the grain from the farm, so that it can ship its product without back haul and on transit in connection with the through rate.

The development of mills at the seaboard or in near-by territory may, therefore, be dismissed from consideration, and the real ques-

[1] Production fell short of consumption by 20,549,000 barrels in the East and by 7,624,400 barrels in the South. In this connection it is of interest to note that in 1925 the wheat production in the East was sufficient to make only 2,131,556 less barrels of flour than were produced. The similar deficiency in the South was 3,326,112 barrels.

tion is whether a flour differential would make it profitable to increase production at mills in central territory, and particularly at mills located on Lake Erie. Broadly speaking, such mills would have a conceivable advantage in the sale of flour only in territory lying beyond, in line with the inbound movement of the grain. Except within very narrow limits, they would certainly have no advantage where a back haul on their flour would be involved. Moreover, in shipping on transit to points beyond in connection with all-rail movements, the final rate paid, if usual transit rules were applied, as I believe they should be, would be the rate on flour all the way from origin of the grain to ultimate destination. Under such circumstances they would have no advantage over western mills shipping on transit in connection with the same through rates. Mills at Buffalo or other ports on Lake Erie, however, receive much of their grain by water, and it is carried by boats which are not common carriers and whose charges are not under our supervision. A differential on flour from western territory might be of some help to those mills in competing in trunk-line territory or New England. The amount of the benefit would apparently depend, however, upon the extent to which they would be able to find a market for their by-products in the same territory, without back hauls; upon the proportion of their grain brought in by water; upon the level of the rates maintained by the official territory lines upon ex-lake flour; and upon the level of the new rates upon flour from the West, as compared with the present rates. The new rates, although including a differential, might average no higher than the present rates, in view of the reductions which we are requiring in the wheat rates in western territory. The ability of the western mills to compete would also be affected, of course, by their operating costs and the selling qualities of the flour which they produce in comparison with flour made by the Lake Erie mills.

A further important factor which enters into the situation is that the mills which are located near the grain fields have an advantage, due to their close contact with the producer, in obtaining the choicest grades of wheat at the most favorable prices. This is because the producer is assured of a quick and definite return if he sells to near-by mills, and he usually prefers to trade in this way.

The upshot of this matter is that the record does not present the economic facts which are necessary if the effect of a flour differential is to be appraised with any accuracy. It seems clear, however, that such a differential would have a much less serious effect upon the western mills than is commonly supposed; and that the benefit, if any, to eastern producers would be confined very largely to the mills on Lake Erie.

It should be borne in mind that these mills on Lake Erie, owing to the low cost of moving grain by boat from Duluth, have long had an apparent advantage over the western mills of substantial extent in the sale of flour in trunk-line and New England territories; but their growth was slow until the development of the great wheat fields in western Canada. This Canadian wheat feeds into the Great Lakes at Port Arthur and Fort William, and the Buffalo mills, which are on its direct route to the seaboard, can mill it in bond for export. It is this situation which has given the great impetus to Buffalo milling in recent years, as we stated in *Grain and Grain Products to Eastern Points*, 122 I. C. C. 551, 558–559:

> The proposed rates on flour are designed primarily to reduce the movement of wheat from Duluth to Buffalo by lake and the production of flour for domestic purposes at Buffalo. However, it is not this flour production which has been primarily responsible for the decline of Minneapolis or the rise of Buffalo as a milling center during recent years. Until 1925, when the large Minneapolis interests began the operation of two additional plants at Buffalo, the Buffalo production of domestic flour showed more of a tendency to decline than to increase. The recent development of Buffalo has been due chiefly to the transfer to that point of practically all the export milling that Minneapolis formerly enjoyed. Buffalo is a natural gateway for intercepting and milling wheat from practically all North America. Minneapolis is a natural gateway only for grain from the affected and immediately adjacent territory. Buffalo receives its grain largely from sources from which Minneapolis mills could not normally draw except at a penalty. It is milling in bond for export large quantities of Canadian wheat brought over the lakes from Port Arthur and Fort William, Ontario. Wheat from the Central West, the production of which has increased in recent years, also comes to Buffalo for milling.

And again at page 562:

> According to Missouri River millers, it is the Minneapolis, rather than the Buffalo, prices that they have to meet in selling flour in the East. A very large proportion of the flour consumed in the destination territory comes from the Northwest. Competition from that source has been particularly keen in recent years. The Buffalo production, as we have already seen, is largely for export. Buffalo does not have sufficient capacity to continue its export production and also supply a large proportion of the domestic requirements in the destination territory.

It will be noted from the above that milling at Buffalo is not confined to grain received by lake, but that to meet its needs in the manufacture of various grades of flour it also draws wheat from the central West.

Certain statistics introduced of record by the Southwestern Millers League are of great interest in this connection. They show that, comparing the year 1925 with the year 1914, the production of flour in the East and the South decreased 6.8 per cent, whereas the de-

crease in the western district was only 0.4 per cent. In the South the decrease was 9.4 per cent; in the East it was 5.9 per cent; and in the East with the exception of New York State, where the Buffalo mills are located, it was 29.2 per cent. Production in the northwestern district[2] decreased 14.4 per cent, and in the central western district[3] 28.3 per cent; but it gained 22.2 per cent in the southwestern district[4] and 12.8 per cent in the Mountain-Pacific district.[5] The gain, so far as production for eastern and southern markets was concerned, was in the Southwest rather than in the East. It is of interest to note that the production in California, a State which has the supposed benefit of a flour differential on traffic from other States, decreased 9.4 per cent, whereas in Utah, a State which suffers the supposed disadvantage of that differential, the production increased 105.6 per cent. In Colorado it remained practically stationary. In Texas, another State which has had the supposed advantage of a flour differential, the production increased 9.4 per cent, whereas in Kansas and Oklahoma, two States which have suffered the supposed disadvantage of that differential, it increased 19.8 and 14.3 per cent, respectively.

These figures are confirmed by other statistics showing mill capacities in 1927 as compared with 1920. In the West the decrease was 7 per cent, whereas in the East and South it was 14.2 and 12 per cent, respectively. Eliminating New York, the decrease in the East was 22.3 per cent. The decrease was 19.6 per cent in the central western district, 14.2 per cent in the northwestern district, and 5.5 per cent in the Mountain-Pacific district; but in the southwestern district there was an increase of 3.2 per cent. In California there was a decrease of 18.3 per cent, whereas there was an increase of 21.2 per cent in Utah and a slight increase in Colorado. In Texas the increase was 10.2 per cent, and in Kansas it was 11.5 per cent. A slight increase occurred in Oklahoma.

Passing from the flour differential to the matter of a transit charge, it is difficult to see how such a charge will operate as a handicap to the western mills, provided it is uniformly assessed in a uniform amount, not only at transit points but at rate-breaking points and ports. This was, indeed, the conclusion of the chief traffic officer of the Chicago, Burlington & Quincy. It is probable, however, that such a charge would reduce the amount of transit service furnished,

[2] Minnesota, South Dakota, North Dakota, Montana.
[3] Wisconsin, Illinois, Iowa.
[4] Nebraska, Kansas, Missouri, Arkansas, Oklahoma, Texas, Louisiana.
[5] Washington, Oregon, Idaho, California, Nevada, Utah, Arizona, New Mexico, Colorado, Wyoming.

and that it would unfavorably affect mills so located that they depend upon circuitous routes and several transits en route. Its tendency would no doubt be to encourage the mixing of feeds at points where grain is also stopped for milling. It might also encourage combined storage and milling at points comparatively near to the wheat fields. But these are changes which would help many of the western mills rather than hurt them, and the injured would be those who are dependent largely upon the more uneconomical results of the present transit practices. It is a case where benefits must be weighed against disadvantages, and here the former, I think, would clearly predominate.

Level of the rates.—Throughout this proceeding the Hoch-Smith resolution has been emphasized. In a situation like that which is here presented, that resolution makes it our duty to prescribe the "lowest possible lawful rates compatible with the maintenance of adequate transportation service." In a recent case, *Ann Arbor R. R. Co.* v. *United States*, decided June 2, 1930, the Supreme Court considered and set aside our action, in part under that resolution in *Calif. Growers' & Shippers' Protective League* v. *S. P. Co.*, 129 I. C. C. 25, 132 I. C. C. 582. Referring to the third paragraph of the resolution, which contains the language with reference to the "lowest possible lawful rates," the court made this statement:

> Indeed, it is apparent from the commission's opinions that it regarded this paragraph as requiring it to condemn the existing rates as unreasonable and unlawful, although had they been considered independently of the paragraph, they must have been upheld as reasonable and lawful under the applicable sections, 1(5) and 3(1), of the existing law.
>
> We are of opinion that the commission's construction cannot be supported. The paragraph does not purport to make any change in the existing law, but on the contrary requires that that law be given effect. Nor does it purport to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law.

Later, in referring specifically to the words "lowest possible lawful rates compatible with the maintenance of adequate transportation service," the court said:

> If they mean no more than that the depressed condition of the industry is to be given such consideration as may be reasonable considering the nature and cost of the transportation service and the need for maintaining an adequate transportation system they work no change in the existing law.

And it finally arrived at the conclusion that these words "must be held to work no substantial change in the meaning or operation of Sections 1 (5), 3 (1), and 15, paragraph (1), of the existing law."

In *Grain and Grain Products*, *supra*, at page 264, we interpreted this provision of the resolution as follows:

> It sets no new standard of lawfulness, but provides, in effect, that to the extent that there are flexible limits to our discretion, we shall require the maintenance of the lowest rates falling within those flexible limits. Rates that may lawfully be required must in principle be high enough to cover all of the cost that may fairly be allocated to the service plus at least some margin of profit. *Northern Pacific Ry.* v. *North Dakota*, 236 U. S. 585; *Norfolk & Western Ry.* v. *West Virginia*, 236 U. S. 605. But it has always been recognized that the burden of transportation may reasonably be adjusted with some regard to the value of the service; in other words, that the higher grade, more valuable commodities may be required to pay a greater margin of profit than those that are of lower grade and less valuable. The substance of the provision of the resolution quoted above is that agricultural products affected by depression shall in this respect be included in the class of most favored commodities, to such extent, at least, as may be "compatible with the maintenance of adequate transportation service."

In my judgment this interpretation is entirely consistent with the provisions of the interstate commerce act, although it may be that for the sake of clarity we should have used the words "some substantial margin of profit." I disagreed with the conclusions reached in *California Growers' & Shippers' Protective League* v. *S. P. Co.*, *supra*, because I did not believe that those conclusions were adequately supported by the evidence in the light of this interpretation of "lowest possible lawful rates." But under that interpretation such rates, it will be noted, must be "high enough to cover all of the cost that may fairly be allocated to the service plus at least some margin of profit." Pointing out, then, that it has always been recognized that some commodities may be required to pay a greater margin of profit than others, we reached the conclusion that it is the intent of the resolution that agricultural products affected by depression "shall in this respect be included in the class of most favored commodities."

In its recent decision, above cited, the Supreme Court makes it clear that "conditions in the particular industry may and should be considered along with other factors in fixing rates for that industry and in determining their reasonableness," and that the "depressed condition of the industry is to be given such consideration as may be reasonable considering the nature and cost of the transportation service and the need for maintaining an adequate transportation system." But if rates can not be reduced below the cost of service plus some substantial margin of profit, as was found in *Northern Pacific Ry.* v. *North Dakota*, 236 U. S. 585, obviously the only way in which the depressed condition of an industry can be given any weight is in determining the margin of profit to be allowed. That

the percentage may be varied is clearly indicated in the case just cited, where the court said, at pages 598, 599:

> The legislature, undoubtedly has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business.

But if the percentage of profit may be varied, obviously the variations may be both above and below the normal percentage, because only in this way can a reasonable average be maintained. It follows, therefore, that our interpretation of "lowest possible lawful rates," above quoted, is consistent with the interstate commerce act and the Supreme Court's construction of that act.

We also had this to say in *Grain and Grain Products*, *supra*, at page 266:

> The Hoch-Smith resolution has brought to the forefront the question of the distribution among commodities of the transportation burden, thus emphasizing the need for considering the relative costs of service and the relative earnings of the various kinds of freight traffic, difficult as this task may be.

We further said:

> It is also clear from the record in this case that the rates on grain and grain products, particularly to the primary markets, are deserving of a consideration, from the standpoint of relative earnings and fair share of the transportation burden, which perhaps has not hitherto been sufficiently given them. We have pending No. 17000, Part 7, *Grain and Grain Products*, hereinafter called the general investigation, which embraces the rates on grain and grain products in the entire western district and from that district to the ports of the country for export. That proceeding will afford the opportunity for such consideration.

This was notice that in this general investigation we would wish to obtain all the information possible in regard to the cost of transporting grain and grain products. Several of the State commissions responded to this suggestion and at considerable trouble and expense prepared and submitted cost studies that were more or less comprehensive. Statistics and studies were also presented by our Bureau of Statistics. The carriers, however, refrained from offering any direct evidence in regard to costs and contented themselves with rebuttal evidence of fragmentary character in criticism of the studies made by others. It is their position that it is not practicable to ascertain the cost of hauling grain and grain products. Yet this has not been their position with respect to other forms of traffic, in contesting the orders of State commissions on the ground of confiscation. In *Nor. Pac. Ry.* v. *North Dakota*, 236 U. S. 585, at page 590, where lignite rates prescribed by the State were found to be confiscatory, the following was quoted from the opinion of the State court:

As a result of the painstaking work of the accounting department of this railway company, and its endeavors to render all the assistance possible in determining the matter of the apportionment of expense to this commodity, as is evidenced by the care and detail in the accounting, the information furnished by the exhibits, and that the books of the company have been thrown open to the experts of the State, we are enabled to arrive, with a reasonable degree of certainty, at the proper proportion of expense that should be chargeable against the revenue received from the carriage of this commodity.

The State court made a finding in dollars and cents of the amount of expense chargeable to the traffic in question, and this finding was sustained by the Supreme Court. See also *Nor. Pacific* v. *Dept. Public Works*, 268 U. S. 39, and *Boyle* v. *St. Louis-San Francisco R. R.*, 222 Fed. 539.

Under the accounting and statistical systems now maintained by the carriers it is difficult to arrive at a wholly satisfactory approximation of the cost of handling any particular form of traffic, without a very elaborate and costly special study based on checks and observations extending over a comparatively long period of time and having for their purpose the accumulation of data which are not recorded as a matter of normal routine. However, although no such special study has here been made in any comprehensive way, there is considerable evidence of record bearing on costs, and by the reasonable exercise of informed judgment it is possible, I believe, to arrive at conclusions with respect to the average costs of transporting grain and grain products in the western district which will not be arbitrary but within reasonable limits of accuracy.

In the resolution the words "lowest possible lawful rates" are qualified by the phrase "compatible with the maintenance of adequate transportation service." In order to maintain such service, carriers must in the long run be able to earn what may be termed a minimum fair profit. It is imaginable that in the western district, or certain of its regions, competitive conditions so control and limit the rates on other important traffic that the only way for the carriers to earn a fair profit is to make the rates on grain and grain products pay more than their fair share. It may be urged with much force, also, that if this fact were established it would be our duty under section 15a to permit the rates on grain and grain products to be maintained at such requisite level. By similar reasoning it is urged by representatives of railroad security holders that if the carriers in a given group are earning less than the fair return contemplated by section 15a we are estopped from requiring reductions in rates affecting any substantial volume of traffic, no matter what the level of those rates may be.

I can not accept this theory. Our duty under section 15a is to be performed in the exercise of our power "to prescribe just and reasonable rates," and those words in turn are to be read in the light of the Hoch-Smith resolution. Our duty in this proceeding, as I see it, is to prescribe rates on grain and grain products designed, on the evidence before us, to cover the cost of handling that traffic plus a substantial margin of profit, although not as large a margin as might be reasonable in the case of certain other forms of traffic. It will, however, remain our duty under section 15a to see to it that the carriers have a general body of rates sufficient to produce, "as nearly as may be," the fair return stipulated by that section. It may develop that this can not be accomplished, owing to various competitive conditions, without imposing a further burden upon grain and grain products. But we can not assume in this proceeding that this will prove to be the fact. It remains to be established after a thorough consideration of the rates on other forms of traffic.

While I concede that such consideration of other rates is a duty which rests in the final analysis upon us, the carriers should realize that it is a task of vast proportions, that they have a much more intimate knowledge of the rate situation within the regions in which they operate than we can possibly have, and that considerable delay may ensue in locating rates which are unnecessarily depressed, unless they take the initiative in bringing such rates to our attention. It would seem that this would be a thing which they would be very ready to do, but there is reason to believe that the competition among the carriers is so intense that where the movement of important traffic is controlled by large concerns which can divert it at will from one competitive route to another, the initiative of the carriers in this respect may be subject to paralysis. The representatives of the security holders conceded this frankly upon argument.

It is a situation which calls for courage and cooperation on the part of the carriers, and if they are lacking in these qualities, they will have themselves primarily to blame for the consequences which may ensue. The record here suggests that among the rates which are worthy of analysis are those on cereal breakfast foods and other specially prepared grain products, which are now accorded the same rates as wheat. In fact, the whole grain-products list should be revamped.

Before attempting to derive conclusions from the cost evidence, it may also be well to compare some of the existing rates on wheat with the rates which we have ourselves prescribed on certain other traffic. Such comparisons are shown in the accompanying table.

Miles	Minnesota scale [1]	15026 scale [2]	Southwestern sand and gravel scale [3]	H. & H. bituminous scale [4]	H. & H. anthracite scale [5]	Mason City brick and tile scale [6]	Southwestern brick and tile scale [7]	Southern fertilizer scale [8]	Southern cement scale [9]	Southwestern salt scale [10]	Eastern iron and steel scale [11]
10	4.5	8	2.5	4.25	4.25	5	4.5	5	5	8	6.5
50	8	12	3.7	5.1	6	7	6.5	8.25	9	10.5	11
75	10	14	4.5	6.4	7.3	8.5	8	10	10.5	12	13.5
100	12	16	5	7.25	8.15	9.5	9	11.25	11.5	13	16
150	13	19	6.25	9.1	10	11	10.5	13.75	13	15.5	19
200	14	22	7.5	10.95	11.85	12	11.5	16	14	18	21.5
300	16	27	9.5	14.3	15.2	14.5	14	19.75	16.5	22.5	26.5
400	17.5	31	11	17.3	18.25	16.5	16	23	19	25	31
500	19.5	35	12.5	19.25	20.65	18.5	18	25.25	21.5	27	35
600	.....	38	14.5	22.15	23.1	20.5	20.5	27.75	24	29	38
700	.....	42	16	.....	.....	22.5	22.5	30.25	26.5	31	41

[1] Minnesota intrastate scale on wheat; average loading in western district about 41 tons.
[2] Prescribed on wheat from Oklahoma to Louisiana in *Oklahoma Millers' League* v. *A. & M. R. R. Co.*, 128 I. C. C. 523.
[3] Prescribed (single-line hauls) in *Sand, Gravel, Crushed Stone, and Shells*, 155 I. C. C. 247; average loading about 50 tons, joint-line scale a little higher.
[4] Prescribed on bituminous coal in *Holmes & Hallowell Co.* v. *G. N. Ry. Co.*, 69 I. C. C. 11; average loading about 35 tons.
[5] Prescribed on anthracite coal in *Holmes & Hallowell Co.* v. *G. N. Ry. Co.*, *supra*.
[6] Prescribed in *Mason City Brick & Tile Co.* v. *Director General*, 107 I. C. C. 702; average loading about 34 tons.
[7] Prescribed in *Southwestern Brick Cases*, 107 I. C. C. 661; average loading about 35 tons, joint-line scale 1 cent higher up to 500 miles.
[8] Prescribed in *Fertilizers between Southern Points*, 113 I. C. C. 389; average loading about 23 tons.
[9] Prescribed in *Southern Cement Rates*, 132 I. C. C. 427; average loading about 37 tons.
[10] Prescribed in *Salt between Western and Southwestern Points*, 120 I. C. C. 91; average loading about 20 tons.
[11] Prescribed in *Iron and Steel Articles*, 155 I. C. C. 517; average loading about 32 tons.

In the case of wheat, this table shows the Minnesota scale, which is relatively low, and the so-called 15026 scale, which is relatively high. The compared rates are for the most part on commodities of lower value than wheat, but value plays an insignificant part in the cost of handling traffic, and it is in such costs that we are here primarily concerned. As shown by the footnotes, some of these commodities do not load on the average as heavily as wheat. They all move in box cars, except sand and gravel.

The following table shows also the ton-mile and car-mile earnings under the Minnesota scale at typical distances, on the basis of an average loading of 37 tons, which I think is lower than the present average figure in that region for wheat and coarse grains combined:

	Ton-mile earnings	Car-mile earnings
	Mills	*Cents*
100 miles	24	88.8
200 miles	14	51.8
300 miles	10.7	39.4
400 miles	8.75	32.4
500 miles	7.8	28.8

These can not, certainly, be regarded as conspicuously low earnings.

In this connection mention should be made of the Canadian rates on wheat eastbound to the Lake Superior ports. The rates from

North Dakota and Montana to Duluth range from 39 to 98 per cent higher than the wheat rates from Manitoba and Saskatchewan to Fort William for similar distances. The latter rates, it should be said, are relatively lower than rates in eastern Canada. They apply on coarse grains as well as wheat, and the movement is largely confined to wheat. A separate charge of 1 cent per 100 pounds is made for transit. There is much evidence of record in regard to these Canadian rates. It appears that the Canadian railroads have certain advantages over the United States roads in the way of Government aid and lower taxes, but they also labor under certain disadvantages, such as lesser volume of traffic and higher cost of fuel. In a report dealing with these grain rates, made by the Board of Railroad Commissioners of Canada on August 26, 1927, the following statement was made:

> As to whether the present grain rates are profitable to the railways; it was established by reference to the official traffic returns made by the railways themselves, not only that the net earnings per mile of line were higher in the western grain traffic region than in the region east of the Great Lakes but, also, that it was during the months of heaviest grain movement that the net returns were highest. This applied to both railway systems. It was also shown that the net returns were higher in the years of largest crop. In view of these facts, it does not seem possible to accept as proven the first contention of the railways that the present grain rates are, in themselves, unprofitable.

It can hardly be said that respondents have proved that these Canadian rates do not throw valuable light on the cost of transporting grain, particularly where there is little transit service, and none of it "free," where the proportion of coarse grains and grain products moving on the wheat rate is comparatively small, and where the traffic moves in trainload quantities over direct routes located largely in prairie country.

It is an interesting and rather significant fact that within the last few years there has been more activity in the construction of new railroad lines in the western grain regions, more particularly in the Texas Panhandle and Oklahoma, than in any other part of the United States. In several of these cases we have had to choose between rival carriers in granting certificates of convenience and necessity, and all of them have been characterized by most optimistic estimates of anticipated net earnings. As illustrations, the following may be cited:

Construction of extension by B., M. & E. R. R., 86 I. C. C. 286.
Extension of branch by Great Northern Ry. Co., 99 I. C. C. 432.
Construction by C., R. I. & P., 111 I. C. C. 137.
Construction by C. & O. W. R. R., 131 I. C. C. 253.
Construction by B., M. & E. R. R., 133 I. C. C. 279.
Construction by Chicago, R. I. & G. Ry. Co., 158 I. C. C. 413.

The Great Northern case above cited had to do with the construction of a branch line 50 miles long in the wheat country of Montana. The carrier estimated the gross revenue to its system from traffic to and from the branch at $579,322 for the first year of operation and at $1,345,310 for the fifth year. The corresponding net railway operating income was estimated at $154,035 for the first year and $471,662 for the fifth. Two of the cases cited have to do with construction by the Beaver, Meade & Englewood, which now operates about 65 miles of line in western Oklahoma. Nearly all of the line has been constructed within the past few years, and out of 3,812 carloads which it handled in 1928, 2,700 were of wheat. In 1929, division 4 authorized the Missouri-Kansas-Texas to acquire control of this carrier at a price equivalent to $312 per share for its common stock. *Control of Beaver, M. & E. R. Co.*, 158 I. C. C. 219. The Rock Island also sought to acquire control at the same price.

Returning to the question of transportation cost, the basic evidence upon this question is that furnished by our Bureau of Statistics. It will be well, I think, to describe this evidence a little more fully than is done in the main report. The object was to arrive from the statistics of Class I railways at a reasonable approximation of the cost of transporting grain in the western district. The first step was to segregate the operating expense related solely and apportioned to freight service, as reported by the carriers. From this amount was deducted the expenses reported for "transportation-water line" and also for "miscellaneous operations," for which separate revenues are obtained. The sum so determined was next divided one-third to terminal and two-thirds to line, an apportionment based on the best information available to the bureau. From the terminal expense so arrived at, there was then deducted an estimate of the clerical and handling expense connected with less-than-carload freight, based upon a study made by the western carriers in 1923. Two-thirds of the remaining terminal expense was taken as dependent upon the number of cars handled and one-third as dependent upon the gross weight of cars handled and their lading. The line expense was taken as dependent upon gross ton-miles of cars loaded with revenue freight or empty. From available statistics it was possible to arrive with approximate accuracy at the equivalent number of cars handled during the year receiving two terminal services each, the gross weight of such cars and their lading and the gross ton-miles of cars loaded with revenue freight or empty.

Cost units per car and per ton of gross weight for terminal service and per gross ton-mile for line-haul service were then determined. Finally, from these units there were derived, by considering the per-

centage of empty movement of box cars, the tare weight of box cars and the average loading of the various general classes of grain and grain products, unit costs per 100 pounds for terminal service and for line haul in the case of each one of these general classes. These were operating costs, and to them were added allowances for hire of equipment and joint-facility rents, taxes, and a return on the book value of carrier property. This was done by ascertaining the gross amount of these items, assigning a portion to freight service in the ratio of freight to passenger operating expense, ascertaining the percentage which this portion bore to total freight expense, and then inflating each of the unit-operating costs by this percentage. Return on book value was figured on a 4 per cent and also on a 6 per cent basis, producing alternative final total unit costs. With these data, total costs per 100 pounds of transporting each of the general classes of grain and grain products for 200, 300, 400, and 500 miles were determined, thus furnishing the rudiments of a scale.

This is stating the process followed by the bureau, of course, very briefly and baldly. It was supported by testimony of the director of the bureau, giving in detail, as the result of his years of experience, observation, and study, the reasons for what was done, including any assumptions that might on their face seem arbitrary.

The results may be checked by the criticisms of the State commissions, backed in some instances by very elaborate special studies of their own, and by the criticisms of the carriers. The latter were largely devoted to pointing out, likewise with the help of certain statistical studies, the fact that the bureau's analysis only purported to show the average costs in the western district of hauling traffic in box cars loaded as heavily as cars of grain and grain products are loaded. It did not undertake to give weight to special costs incurred in the handling of the latter traffic, alleged to be such as the furnishing of grain doors and tight equipment, the peak characteristics of the traffic and the consequent storing of cars in or near the grain fields to meet the demands of these peaks, the high percentage of branch-line movement, the relatively high percentage of empty-car haul, extra expense at terminals, and one or two other items.

In considering these alleged "special costs" it is necessary to have in mind the fact, of which we are well aware from long experience, that there are many other important kinds of traffic which the carriers are wont to claim are characterized by "special costs," and that all of these "special costs" are included in the basic figures of freight operating expense used in its analysis by the Bureau of Statistics. These facts were, indeed, conceded by the carriers. The question, therefore, is not simply whether "special costs" attach to the grain and grain-products traffic, but whether in the case of such traffic these costs are

of greater relative importance than in the case of the average of all freight traffic. Upon this point the record throws little light, but it can not be ignored.

In using the cost data in the construction of what has come to be known as a "yardstick scale," * I have given consideration to the criticisms which were made of the bureau's original study, and also to certain other matters The following factors have been given particular weight:

1. The bureau's analysis was based on statistics for the year 1925. More recent figures, reported by the carriers, indicate some substantial improvements in economy of operation.

2. The analysis shows costs of handling per mile. In constructing scales it must be borne in mind that while the rates would be determined by the distances over direct routes, the same rates should in the public interest be applicable within reasonable limits over circuitous competitive routes.

3. The record indicates that there is probably a materially greater empty-car movement in connection with the grain traffic than in the case of box-car traffic in general in the western district. And while the evidence offered by the carriers as to "special costs" is decidedly vulnerable in many respects, it leaves the impression that there is probably some little excess cost of this character, in comparison with the average for all traffic, which ought to be given consideration. But I think that this latter factor is sufficiently covered by using the cost data covering a 6 per cent instead of a 4 per cent return.

4. The analysis does not make any allowance for the passenger deficit in the western district. The carriers contend that it is impossible to reduce this deficit under present conditions by raising fares, and therefore that the deficiency must be supplied through the revenues received from freight traffic. Following this reasoning, it is their position that a proportionate part of the burden must be borne by the grain and grain-products traffic. They measure the deficiency by the amount needed to cover passenger operating expense, equipment and facility rents, and taxes assignable to this service, and 6 per cent upon the book value of the carrier property used in the service. Such an allowance is not, of course, a part of the cost of handling the grain and grain-products traffic. It may fairly be considered, however, in determining the lowest possible lawful rates on such traffic "compatible with the maintenance of adequate transportation service." Upon the present record, I do not think that the grain and grain-products traffic should bear more than a propor-

* Scales which can be used as a guide in determining the rates to be applied in the western district.

tionate share of the actual operating deficit incurred in the passenger service. It should not be asked to pay more until there is better proof that unnecessary waste and duplication in that service have been eliminated, and that it is impracticable to obtain added revenue from other forms of freight traffic.

5. Two cents per 100 pounds may fall somewhat short of a fully compensatory charge for transit service; and the excess cost of hauling grain products, in comparison with wheat, is more than 10 per cent. However, it should be borne in mind that when grain is milled in transit, I would apply the flour rate back to the origin of the grain, so that the 10 per cent differential would cover in part a grain movement. This would offset to some extent the apparent deficiency in level of the differential.

In arriving at rates to apply in different sections of the western district, I have taken into consideration the ordinary transportation conditions prevailing in those sections; the extent to which transit service is furnished; and the proportion of the movement which consists of coarse grains and grain products. In constructing a scale, also, I have made the progression more nearly uniform than usual. This is in line with such cost evidence as has a bearing on this point. Moreover, the amount of transit service furnished, the proportion of grain products included in the traffic, and the use of circuitous routes tend to increase with the length of the haul. The scale which I have arrived at is not, of course, to be regarded as a precise mathematical computation, but rather as a product of judgment applied to the best available evidence. I believe it to be sufficiently liberal to the carriers, either under the interstate commerce act or the Hoch-Smith resolution.

The basic "yardstick scale" which I would use would be as follows:

	Rate		Rate
	Cents		*Cents*
5 miles	4	800 miles	30
100 miles	9	900 miles	33
200 miles	12	1,000 miles	36
300 miles	15	1,100 miles	38.5
400 miles	18	1,200 miles	41
500 miles	21	1,300 miles	43.5
600 miles	24	1,400 miles	46
700 miles	27	1,500 miles	48.5

This, of course, is a mere skeleton of the scale, and it would be necessary to fill it out for intermediate distances, and also to extend it for longer distances in some instances.

This basic scale I would apply in western trunk-line territory, except that from South Dakota, Nebraska, Kansas, Colorado, and Wyoming I would increase the yardstick by 5 per cent as far as the

primary markets on the Missouri River and to points on the line of the Omaha between and including Sioux City and St. Paul. I would not increase it from points in Montana and North Dakota, because the traffic from those points is very largely wheat, with a substantial percentage of flaxseed taking higher rates, and because it moves quite generally in volume over direct routes to Minneapolis or Duluth under favorable transportation conditions and with comparatively little transit service. From South Dakota there is a far larger percentage of coarse grains and less concentration of the traffic in moving to the primary markets; in Nebraska, also, there is a large percentage of coarse grains; Kansas is full of mills and there is a large amount of transit service; and the transportation conditions, particularly the volume of this traffic, are less favorable from Colorado and Wyoming. East of the Missouri River and the Twin Cities, the percentage of movement of coarse grains and grain products is large and there is much transit service, but this is offset by the favorable transportation conditions, from the ordinary point of view. Within the Southwest I would increase the scale by 10 per cent, because of the somewhat less favorable transportation conditions, as compared with western trunk-line territory, and the large amount of transit service and volume of movement of grain products. In Mountain-Pacific territory I would increase the scale by 20 per cent, because of the less favorable transportation conditions, except that from points in Oregon and Washington to the Pacific coast ports I would limit this increase to 15 per cent, inasmuch as the transportation conditions surrounding those hauls appear to be more favorable than the average in Mountain-Pacific territory.

Of course these scales should not be applied rigidly, for I have no doubt that origin and destination groupings could be employed advantageously in many instances. These details I have not undertaken to work out, since the general plan which I have thus outlined and which I prefer is not to be adopted. So far as I have been able to determine, also, if we apply the "lowest possible lawful rates" to domestic movements of grain and grain products and charge separately for transit, there are no differences in transportation conditions which justify lower export rates.

As to rate breaks.—Whether or not there should be rate breaks at certain primary markets is a debatable and difficult question. The general plan of rates which I have outlined could be adapted to such rate breaks, if that were deemed necessary, but I am not fully persuaded that it is necessary or advisable.

The rate-break scheme seems to be founded on the thought that there are certain cities which are foreordained to be great grain markets, and that they are, therefore, entitled to a method of con-

structing rates which is of advantage to them in their marketing and which is not extended to other communities. It is asserted that the custom of according a rate break to these particular cities grew up naturally and normally, chiefly as a result of carrier competition. But the same might be said of the basing-point system of rate making in the South, under which a hierarchy of larger cities was created and the smaller communities were relegated to a lesser and subservient estate. There we have not hesitated to interfere with a custom which grew up as a result of many years of carrier competition, and we ought not to hesitate here if the rate-break plan operates unfairly.

That there has been a considerable element of undue preference in the operation of the rate breaks is, I think, quite clear. Some of the principal grounds for criticism have been eliminated by the report which we have adopted. I refer particularly to the fact that these markets have had the benefit of both proportional rates and transit balances. The worst features of this abuse were due to the application of rates over absurdly circuitous routes and to the utter lack of adequate transit regulations, and should have been corrected by the carriers long since. But a consistent application of the rate-break system makes it necessary either to limit considerably the territory from which particular markets may draw grain with advantage, or else to distort the rates somewhat to improve this situation.

Proportional rates out of grain markets have for many years been a fertile and prolific field of litigation before this commission, and this is likely to be the situation so long as the rate-break system is continued. In the report which has been adopted an earnest effort has been made to adjust the proportionals properly, but that is a very difficult undertaking, and I do not find the results altogether satisfactory. And if the markets are actually confined to rate breaks in the manner proposed and are not allowed transit on any through rates, I doubt whether they will find the results altogether satisfactory. On the whole I find myself impelled to the conclusion that it would be well to abolish the rate-break system entirely and confine the markets to operations on transit. Such a step should be accompanied by the adoption of stringent transit regulations and by a limitation upon the circuity of the routes over which the through rates are applied. Such rates as I would like to see adopted ought not to be applied over routes having a circuity in excess of 25 per cent, although of course this limitation should not be too rigidly followed. In the matter of transit regulations there should at least be a daily cancellation of inbound billing, and doubtless there are other reforms which are desirable. The scale which I have sug-

gested, moreover, is so designed that there would not be a great variation in traffic balances if unduly circuitous routes were not used.

In my judgment the markets could operate on such a rate plan, and all would have opportunities consistent with their geographical locations. It is precisely such a plan as minor markets like Des Moines, Wichita, and Grand Forks will find it necessary to operate under if the findings in the report which we have adopted are carried into effect. It might be necessary for certain lines to publish out of certain of the markets a system of varying proportional rates, unless we are given the adequate authority which we do not now have over the establishment of through routes and joint rates, but this would simply be a means of paralleling transit balances in effect over other lines. It might also be necessary to give consideration in another proceeding to markets which are gateways into the East and the South, for domestic rates to points in those territories are not here in issue.

I have already indicated that, so far as the farmer is concerned, I believe that the securing of the best possible price for his grain depends more upon the proper organization and cooperation of the farmers themselves than upon the "pulls" of supposedly competitive markets.

Such a system of rates as I have outlined above would, I believe, eliminate much of the waste which is now characteristic of the transportation of grain and grain products in many parts of the western district, with the result that the carriers would perform this service more economically and efficiently. It would also enable the producers to ship grain to market at the lowest lawful rates without paying for service which they do not seek or receive. The effect upon the carriers' net earnings would, I believe, be less severe than in the case of the rates required by the report which we have adopted. I doubt whether the latter rates sufficiently allow for the burden caused by "free" transit and the carriage of grain products at the same rates with grain.

LEWIS, *Commissioner*, concurring:

I qualifiedly concur in the decision reached as the result of this investigation, not because I consider that it represents the best way to dispose of the problem before us, but because the record clearly shows that a readjustment of the grain-rate structure in the territory west of the Mississippi River is necessary; that there are inequalities demanding correction; that too much of the burden of transportation is laid on wheat; and that certain reductions are justified. Though

the average reduction is much less, a survey of specific-point rates reveals cuts of 20, 30, 40, 50, or even 60 per cent in the present rates. Some of the carriers are not at this time in a position to stand such reductions. For that reason I favor somewhat less drastic reductions in domestic rates. At the same time I favor lower export rates under certain transportation limitations. In a concurring expression the argument against such export rates is presented. It is that if we "make rates as low as we can lawfully prescribe, on what basis of law and equity can we compel the carriers to apply still lower rates?" The answer is obvious. We can not, unless we find or create different and less expensive transportation conditions. That is what I have proposed to do by limiting "free" transit on export grain to not more than one, and to require heavier loading, as the carriers required last year as a condition of the emergency export rates. Such requirements change transportation conditions and reduce costs. The result would be that grain and its products would move in less expensive service, earning lower rates. At the same time the carriers would earn more than on the rates, services, and minima herein dictated by domestic movement. I shall demonstrate this in some detail in the text which follows.

It will be made obvious that I do not propose to raise domestic rates to cause, as suggested in the concurring expression, "producers of 600,000,000 bushels to subsidize the producers of 200,000,000 bushels." Rather, I do not favor making the rates on 200,000,000 bushels higher than they should be because domestic millers, markets, and handlers want and get expensive services on the 600,000,000 bushels that the export grain and its products do not require.

Facing the fact that it is not primarily our function to regulate trade and economic conditions, nevertheless Congress, our principal, places on us the duty of devising rate structures under which commodities will move as freely as possible, the country will properly develop, an adequate system of transportation may be maintained, and the carriers may earn as nearly as may be a fair return. This is sound public policy. I am of the opinion that the decision herein reached does not attain these objectives.

This Nation is a surplus producer of grain, particularly wheat. We produce about 800,000,000 bushels a year. Declining domestic consumption is now about 600,000,000 bushels. If surplus 200,000,000 bushels moves out of the country freely there is a relatively stable domestic market. But if the surplus piles up the market breaks, prices tumble, and our general business conditions fall under the blight of the lessened purchasing power of the agricultural sections. A year ago, when the 1929 crop came on, it encountered a carry-over accumulation of approximately 250,000,000 bushels from previous

years. Again, this year a new crop of probably somewhat more than 800,000,000 bushels pours in upon the country, in whose storage capacity there still remains approximately a 275,000,000-bushel carry-over. The visible supply is, therefore, in round figures, over a billion bushels. Under such circumstances the recent crash in grain prices was inevitable. This unfortunate situation will probably continue until production and demand more nearly reach a balance.

Unless we are drastically to cut down our production we must promote exportation and provide an outlet for the surplus. In foreign markets we meet the competition of Canada, Australia, Argentina, and Europe. Most of these countries, because of relatively short rail hauls or for other reasons, can lay their grain down in foreign markets at very low cost.

Our carriers have extended—and we have not interfered—to manufacturers of iron and steel articles, automobiles, and farm machinery rates 25 per cent lower on export than on domestic shipments. If the same principle were here applied to wheat and its products it would have a vast beneficial result. I have favored, and still favor, export rates on wheat and its products 10 or 15 per cent lower than domestic rates, but would require, as a part of the tariff, that such rates be made subject to minimum weights 10 per cent higher in the case of grain, and 50 per cent higher in the case of flour, than apply on domestic movements; also provide that the rate include not more than one "free" transit. Under such an export-rate structure our grain producers would have lower transportation costs with which to meet competition of other nations in foreign markets. Because of more efficient utilization of equipment and less cost of delivery the carriers would receive more per car-mile and per ton-mile for transporting the grain. One illustration will suffice. The prescribed rate between Wichita, Kans., and the ports of Houston and Galveston is 33 cents. The distance is 648 miles. A carload of wheat weighing 80,000 pounds will earn $264. The same car loaded 88,000 pounds and subject to a 10 per cent lower rate would earn nearly the same revenue, while if it moved at a 15 per cent lower rate it would earn $246.84. This is over 38 cents per car-mile. The average yield per car-mile for all traffic is less than 30 cents for a much shorter haul.

Taking flour moving between the same points: On a domestic shipment, at a minimum loading of 40,000 pounds, the earning per car would be $132. Flour can load 60,000 pounds and more, and can so move for export. At a 10 per cent lower rate than domestic, a car weighing 60,000 pounds would earn $178.20, and at a 15 per cent lower rate than domestic it would earn $168.30, or $36.20 more than flour moving at the domestic minimum. Including all sizes of cars, the average loading of flour in 1928 was 48,580 pounds in the South-

western region. Under a 33-cent rate the earning would be $158.40 on a 48,000-pound loading, or $9.90 less than a car moving under a 15 per cent lower rate carrying an export minimum of 60,000 pounds. That it is entirely practicable to apply such car-capacity minima is evidenced by the fact that the export rates in effect last year were subject to minima of 110 per cent of the marked capacity on wheat and 80,000 pounds on flour.

In my opinion the higher minima alone would justify low export rates. There are, however, other elements favorable to export movement worthy of important consideration. The report provides for two transits without charge; the prescribed rates cover and include them. Estimates used in argument are that a transit costs about $22. The record shows that much export grain moves direct to the ports without transit, and on such there would be the saving of the cost of two transits to the carrier or $44. Under my proposal the maximum of transit included would be one, and here the saving would be approximately 9 per cent on wheat and 13 per cent on flour in the Wichita-Galveston case. The $22 cost figure may be too great. Reduce it by 40 per cent, or to a flat figure either 1 or 2 cents a 100 pounds, and still there is a saving in cost of rendering the service. There is an undetermined lesser cost per ton in moving heavy loads than lighter loads in box cars. This has not yet been quite satisfactorily reduced to dollars and cents. However, it is material. There is a still further economy in costs in export movements as compared with domestic movements.

The domestic rates cover nation-wide distribution, much of the grain and its products moving in single cars or in lots of a few cars. Delivery includes placement on individual sidings or industrial tracks at numerous destinations. On the other hand, grain and flour for export move to a limited number of ports, generally in multiple car lots and often in trainloads, and a much greater proportion of the export haul is on main lines with greater density and lesser costs than is true of domestic traffic. Again these lesser costs of rendering service can not be reduced to definable percentages or dollars and cents calculations. However, again, they are material.

Taking all the above transportation facts into consideration and entirely leaving out economic considerations, it seems to me that export rates 15 per cent lower than domestic rates are justified and conservative. They are less than the carriers have extended to certain manufacturers. The effort made by the carriers last year to reduce surplus grain by putting into effect temporary emergency export rates offers no acceptable test of effectiveness of export rates as a part of the rate structure. Those emergency rates were put into effect late and under conditions, such as world-wide publicity, that

were not favorable. The advantage of export rates is acknowledged by carriers and manufacturing industries which have built up large outlets for our products in foreign lands. There is a further justification in the fact that export rates are similar to proportional rates. They apply only to a portion of the through movement. We have always recognized the propriety of proportional rates lower than local rates, not only where there is an additional rail haul, but also to port for transshipment beyond. For example, we made a rate of $2.39 on coal moving from the Inner Crescent of Kentucky to Toledo for domestic delivery and a rate of $1.81 on the same coal when for movement by boat over the Great Lakes to points beyond.

In failing to make export rates lower than domestic rates we disregard another factor which we generally recognize; that is, the value of service. Export grain is often of inferior grade or can not be sold for domestic use. This is rather generally true of the grain exported through the Gulf and Atlantic ports. It is not true of the Montana wheat when exported through north Pacific ports. That wheat, however, has to compete in foreign markets with similar high-grade Canadian wheat moving to Vancouver for export. Northwestern exporters have testified that they will have to withdraw from competition for foreign trade if their export rates, which apply to over 90 per cent of the grain moving from Montana to north Pacific ports are taken away from them. Previously we have declined to permit cancellation of these export rates.

Throughout the entire report there is prominent the consideration of competitive conditions between millers, markets, and ports. In some instances recognition of such competitive conditions has been carried further than probably is warranted on transportation grounds. Considered from the standpoint of the grain producers, the carriers, and the country as a whole, it is vastly more important to recognize the great competition between rival grain-producing nations in keenly competitive foreign markets, which the decision fails to do.

I am extremely doubtful that the heavy reductions made in domestic rates will be of benefit to producers. They will not fail to have serious effect upon certain of the weaker carriers. All carriers, and particularly the western carriers, are now experiencing their part of a world-wide readjustment. Volume of traffic and earnings are falling. The carriers are reducing operating expenses. In doing so they are discharging employees and cutting down their purchases of supplies, equipment, and materials. Heavy reductions in grain rates at this time probably will require still further retrenchment, and directly and indirectly these things adversely affect the purchasing power of probably millions of the grain producers' con-

sumers. The effect will be to decrease, rather than to increase, consumption of grain in this country.

The home market is the best market the American grain grower has. His concern can not lie so much in the few cents a bushel that we may be able to clip off his transportation costs as in the restoration of conditions which give him a seller's market or a return to profitable prices. Exporting the surplus, he must look to the home market for a return of higher prices. It is short-sighted policy to contribute to a debility in and of that market.

The best argument that is made in behalf of the decision herein is that it creates more equitable rate structure which will lend itself to horizontal adjustments up or down. This carries to me intimation that the level herein prescribed is probably too low to be permanent. Stability in rates is one of the highly desirable things to be sought in this or any other adjustment. I have only given expression herein on export rates. I disagree with some of the decisions on some of the details.

I am authorized to say that COMMISSIONER TATE concurs in that part of the foregoing which expresses the opinion that there should be a lower export rate because of different transportation conditions.

WOODLOCK, *Commissioner*, concurring in part:

Certain important features of the instant report enable me to concur in it to a partial extent.

In the first place (and this I consider a very definite merit) the report is essentially pragmatic in character in that it has sought to adjust the rate structure to the established customs, practices, and needs of the industry rather than to create a completely new structure and require the industry to adjust itself thereto. Were we starting with an absolutely clean slate or could we safely disregard the past, logic would no doubt direct us to a different course with respect to many matters herein contained. There is, for example, no warrant other than established custom for a uniform rate on grain and its products any more than there is for the inclusion of "transit" in the line-haul rates. It is, however, manifestly in the public interest to avoid causing violent changes in long-established customs unless there is a compelling necessity so to do.

In the second place, the elimination of transit balances at the important markets is a notable improvement of the existing situation in that it will tend to diminish the marketing costs of the producers' grain.

In the third place, having in mind the present price relation of the various grains and the extremely low level of the rates here prescribed, it is proper that coarse grain should take no lower rates than does wheat.

Lastly, the rates here prescribed will remove most of the many and gross discriminations which have long existed between various localities in the grain-producing territory, and this I regard as a reform of great importance.

My main difficulty with the report is the level of the rates prescribed. They are, in my judgment, far too low. They will involve a reduction of at least $15,000,000 in the revenues of carriers in the western district—perhaps more—and that loss will fall most heavily upon carriers in the Southwest and in the Pacific Northwest which will derive no benefit whatever from our revision of western trunk-line class rates. That revision, indeed, will probably bring about some reduction of class rates in a portion of the southwestern territory. This is a very serious matter when it is remembered that in these districts there are offered but few opportunities for recoupment of this revenue loss from other sources of traffic. The showing made by the western carriers, and particularly the carriers in western trunk-line territory, is impressive in this respect. If the rates herein prescribed are to remain long in effect in this territory, I can not but feel that they will produce a situation which will require emergency remedies if we are to maintain in that territory "an adequate system of transportation." I have little or no confidence in many of the so-called cost studies which seem to justify the rates here prescribed. But for the other advantages of the report and but for one fact with respect to the new rate structure that structure would, in my opinion, constitute a fatal defect which would prevent me from even a partial concurrence in the report as a whole. But one advantage of the structure herein prescribed is that it will be susceptible of horizontal change without much risk of such change producing new and widespread discriminations so that its rectification when such rectification shall be shown to be necessary should not be a matter of great difficulty. I assume that we shall be ready and prompt to rectify the structure if it shall prove, as I fear it will, to be too low.

It is obvious that such intrastate rates as at present are lower than the new interstate level should be brought into line with the new interstate rates herein prescribed. The record in this case brings into strong relief the extent to which some of the Western States have contrived to maintain through many years internal rate structures which are equivalent to a system of "protective tariffs" against neighboring States, and this sort of thing is repugnant to the fundamentals of our governmental system. There is here no question of "State rights," and section 13 (5) should rigidly apply. With interstate rates as low as those herein prescribed and with carrier finances in their present condition any discrimination on the part of intrastate

rates against interstate rates is surely undue and unreasonable and therefore unlawful.

BRAINERD, *Commissioner*, concurring:

I favor a prescription of export rates to the Gulf and north Pacific ports lower than domestic rates, the same as at present awarded the north Atlantic ports; a reasonable differential between the rates on wheat and the rates on coarse grains; and a lesser reduction in the proportional rates and a greater reduction in the rates from country stations to the markets in order to bring about a more equitable division between all concerned of the through rates, however computed or prescribed.

Nevertheless I have concurred in this report chiefly for the reason stated by some of my colleagues, that the decision is a progressive step in rate regulation and the best that can be done at present under all the facts and circumstances.

PORTER, *Commissioner*, concurring in part:

The conclusions of the majority in this case presents another striking illustration of the willful wobbling that is far too characteristic of our decisions in recent days, and which, if persisted in, will tend irresistibly to lower the high regard in which this commission has been held uniformly heretofore by shippers and carriers alike. Commencing with *In the Matter of Alleged Excessive Freight Rates and Charges on Food Products*, 4 I. C. C. 48, this commission held that "wheat and flour should bear the same rate, which should not be more than 15 per cent above the rates on corn and oats. Rates on all grains other than wheat should pay the same rates as corn." That case, establishing a differential between coarse grains and wheat, was followed in principle in a long line of decisions, among which are the following:

In *Aberdeen Commercial Asso.* v. *M. & O. R. Co.*, 10 I. C. C. 289, it was held that corn and oats should uniformly be 2 cents under wheat.

In *Roswell Commercial Club* v. *A., T. & S. F. Ry. Co.*, 12 I. C. C. 339, the corn rate prescribed was 5 cents less than the wheat rate.

In *Ter. of Okla.* v. *C., R. I. & Pac. Ry. Co. et al.*, 12 I. C. C. 367, a differential was prescribed on corn 2 to 3 cents under wheat.

In *Traffic Bureau, etc.*, v. *Mo. Pac. Ry. Co. et al.*, 13 I. C. C. 11, the commission prescribed 11 cents on coarse grains and 13 cents on wheat.

In *Investigation of Advances in Rates on Grain*, 21 I. C. C. 22, 39, from stations east of the Missouri River in South Dakota to Omaha, the commission prescribed the maximum grain rates, corn uniformly 1.5 cents under wheat.

In *Board of Trade of City of Chicago* v. *C. & A. R. R. Co.*, 27 I. C. C. 530, the proportional rate on wheat from Minneapolis and Duluth to Chicago was 10 cents, and it was sought to declare that rate unreasonable and unjustly discriminatory because the rate of 7.5 cents obtained on coarse grains between the same points. The commission considered it, wrote a lengthy opinion, and found that there was no violation of sections 2 and 3 of the act, and found no unjust discrimination by reason of the difference in the rates on the wheat and coarse grains.

In *Sioux City Terminal Elevator Co.* v. *C., M. & St. P. Ry. Co.*, 31 I. C. C. 482, the commission found that the record afforded no satisfactory means of determining what the relationship should be between wheat and the coarse grains, and assumed that the existing relationship at the producing stations was proper, and required the defendants for the future not to exceed as maximum the present spread between their rates on wheat and coarse grains.

In *Farmers, etc., Club* v. *A. T. & S. F. Ry. Co. et al.*, 12 I. C. C. 351, 362, it was held that the differential of 3 cents, corn under wheat for export, should be maintained from Wichita to Galveston.

In *Southwestern Missouri Millers Club* v. *M., K. & T. Ry. Co.*, 22 I. C. C. 422, 428, it was held that rates on corn and corn products from Joplin territory ought not to exceed 27.5 cents, which was 3 cents lower than the rate prescribed for wheat between the same points.

In *Grain Shippers' Asso.* v. *Illinois Central R. Co.*, 8 I. C. C. 158, it was held that the relation of rates between wheat and corn should be that wheat should not exceed by more than 4 cents the rate on corn.

In the *1915 Western Rate Advance Case*, 35 I. C. C. 497, on page 567, it is said by the commission that except in the Northwest, where comparatively little coarse grain is raised, coarse grains usually take lower rates than wheat.

It will be observed that while the differential varied in amount from 2 cents to 15 cents, depending upon the territory involved, there did exist differentials in some amount between the rate on wheat and flour, on the one hand, and coarse grains, on the other, and such differentials prevailed until the World War.

During the war the Director General of Railroads, by an order effective June 25, 1918, increased the wheat rates 25 per cent, with a maximum of 6 cents per 100 pounds, and directed that the rates on coarse grains should be the same as the increased wheat rates. Following the rate increase in Ex parte 74 a complaint was filed attacking this order of the director general, and the commission, by division 2, in *National Council Farmers' Assos.* v. *Director General*, 56

I. C. C. 899, upheld the rates theretofore established by the director general, and thus for the first time held that wheat and coarse grains might move on the same rates. It is important to note that division 2 there had before it only the rates applied during Federal control, and that it did not *require* any changes in the coarse-grain relationship to wheat, but simply left the relationship as it resulted under the director general's efforts to meet certain increased revenue needs in the Federal operation of the railroads of the country.

This, however, was not suffered for long, and in *Rates on Grain, Grain Products, and Hay*, 64 I. C. C. 85, between points in the western and Mountain-Pacific groups, the entire commission, upon an extensive record, found "that the present rates on coarse grains will be for the future unjust and unreasonable to the extent that they may exceed 10 per cent less than those herein prescribed as just and reasonable on wheat from and to the same points." Petition for rehearing was filed and on July 5, 1922, this cause was reopened for further hearing on the question of the relationship of the rates on wheat and other grain and products thereof between points in the western group and between points in the western group and points in the Mountain-Pacific group. The case was fully argued, and on June 4, 1923, in 80 I. C. C. 362, the commission reaffirmed its original finding as to the western rate group, the greatest coarse-grain producing area in this country, or the world, but vacated the part of the finding prescribing a relationship in maximum rates between wheat and coarse grains within the Mountain-Pacific group. Since that decision the carriers have voluntarily published rates on coarse grains 10 per cent less than those on wheat from the various groups to California common points, the Pacific Northwest, Montana common points, Ogden, and Salt Lake City, thus placing the Mountain-Pacific group with respect to coarse grains generally on the same basis as elsewhere in western territory, and that basis has since been maintained and is in effect to-day.

In the instant proceeding we have the most comprehensive investigation which this commission has ever conducted. It extended over many months, and we have a record comprising more than 60,000 typewritten pages and, in addition, thousands of exhibits. In it all not one witness came forward to offer any testimony even suggesting that there had been a change in conditions since our last determination. No question was raised as to the justice of the present relationship as it has existed for eight years. In three solid weeks of oral argument on the final submission of this case not a single voice was raised advocating or requesting that a change be made. But with unanimous acquiescence by the parties in the present 10 per cent differential relationship throughout this entire pro-

ceeding, a majority of this commission, upon their own initiative, without hint or suggestion from anyone, but drawing only upon their own self-conceived notion of what is desirable, here decree that henceforth coarse grain shall move upon the same rates as wheat and flour. They thereby overturn a practice which was voluntarily established by the carriers as early as 1869 and has continued since 1890 upon our order, with the exception of the brief period during and immediately following the war. Against this action of the majority I register my most vigorous protest.

The aforementioned is a part of the fundamental error which pervades the action of the majority in this proceeding. The utter disregard of the just claims of the coarse-grain farmers to relief by reduced freight rates, as compared with the substantial reduction in rates generally accorded the wheat farmer, is striking. The majority are placing all the emphasis upon the producer of wheat and paying little attention to the producer of coarse grains. They ignore the fact that in the portion of the country here under immediate consideration, being that part west of the Mississippi River, including all of Minnesota and also Wisconsin, over a 10-year period, there has been produced annually an average of 1,426,577,800 bushels of corn, 784,370,000 bushels of oats, and 42,602,000 bushels of rye, or 2,253,549,800 bushels of coarse grains, as compared with an average annual production of only 596,785,000 bushels of wheat. Iowa, the heart of the Corn Belt, alone produces annually more coarse grains than the entire production of wheat in this territory. It produces 420,104,000 bushels of corn, 223,000,000 bushels of oats, and 760,000 bushels of rye, a total average annual production of 643,864,000 bushels. The Iowa farmer is here handed a bouquet in the nature of an increase in freight rates on coarse grains to Chicago, his principal primary market, averaging about 10 per cent. The coarse-grain farmer of Missouri, Minnesota, and Wisconsin, the very center of the great corn area of this country, is likewise handed substantial increases in rates to his principal primary markets. Nebraska is the only State in this area producing a considerable amount of coarse grain that is accorded any substantial reduction in coarse-grain rates.

It may be suggested, in answer to this discrimination against the corn producer as compared with the wheat producer, that substantially all of the wheat grown, or the products thereof, moves out of the county in which it is produced over the rails of the carriers to some distant market, while the larger portion of coarse grains is consumed as feed for livestock in the county in which it is produced. While it is undoubtedly true that the carrier is more directly interested in the wheat rate because that commodity moves more exten-

sively, it must be borne in mind that the portion of the coarse grains which actually moves to the primary market fixes the price of that portion which is sold and consumed in the local market. The local purchaser invariably pays to the local producer the first primary-market price, less the freight rate to the primary market. To illustrate the discriminations against the coarse-grain grower, let me instance a few examples.

From Hawarden, Iowa, to Chicago the wheat rate is reduced 1.5 cents, but the rate on coarse grains is increased 1 cent. From Chareton, Iowa, to Chicago the wheat rate is reduced 1 cent and the rate on coarse grains increased 1 cent. From Rock Rapids, Iowa, to Chicago the wheat rate is reduced 0.5 cent and the rate on coarse grains increased 2 cents. From Wisconsin to Chicago the wheat rate from Antigo is reduced 0.5 cent and the coarse-grain rate increased 1.5 cents; from Appleton the wheat rate is reduced 1 cent and the rate on coarse grains increased 0.5 cent; from Marshfield and LaCrosse the wheat rate is reduced 0.5 cent and the coarse-grain rate increased 1.5 cents. From Minnesota to Chicago the wheat rate from Willmar is reduced 2 cents and the coarse-grain rate increased 0.5 cent; from Marshall the coarse-grain rate is increased 1 cent and the wheat rate reduced 1.5 cents; from Faribault the increase on coarse grains is 1 cent, the same as the reduction on wheat. From Missouri to Chicago the wheat farmer will find his rates left generally undisturbed and in some instances slightly increased, while the coarse-grain farmer will find his rates increased, for example, by 3 cents from Chillicothe and St. Charles, 4.5 cents from Columbia, and 5 cents from Martinsburg and Wellsville. This is affording the coarse-grain farmer relief with a vengeance.

The above are typical illustrations of the effect which the findings of the majority will have on the coarse-grain farmer in the four States named. The distressed condition of agriculture, quite fully described in an appendix to this report, unquestionably applies with as much force to the farmer who is producing coarse grains as to the farmer who is engaged in producing wheat exclusively. This proceeding is an outgrowth of the Hoch-Smith resolution, and surely Congress when it passed that resolution admonishing the commission to afford all possible relief to the farmer meant the coarse-grain farmer just as much as it meant the wheat farmer. In view of the material reductions which will follow in the rates on wheat as a result of this report, I see no good reason why the farmers who annually produce 2 billion bushels of coarse grains should be treated in so different a manner. That different treatment is brought about largely by the unwarranted action of the majority in ordering that henceforth coarse grain shall be carried at the same rates as apply to wheat, when it has been carried for so many years on a basis 10

per cent below wheat. While I am in accord with the relief which is here granted to the wheat producer, I feel very earnestly that the findings of the majority fail to accord to the coarse-grain producer that just consideration to which the interstate commerce act and the record in this proceeding entitle him.

The most shocking picture of wanton wastefulness in transportation is presented on this record in connection with the so-called free transit. Back hauls of from 50 to 500 miles are common. Devious meanderings of several hundred per cent in circuity, are frequent, during which two to a dozen transits are accorded and are accepted as a matter of course. The low proportional rates out of the primary markets are mere paper rates, for little if any grain moves under them. It moves on the balance of the through rate far below any such rates. By the use of the mixing and unit rules it frequently moves out of the large market hundreds of miles for nothing. For illustration, you originate a shipment of molasses at New Orleans and ship it to Kansas City. At that point it is mixed with bran, shorts, and middlings and the ingredients necessary to a balanced feed. Then you surrender the molasses inbound billing and send the mixed shipment to Chicago at the balance of the molasses rate, which is the same from New Orleans to Chicago as to Kansas City. This means that the mixed shipment is hauled 400 miles from Kansas City to Chicago for nothing. The pity of it all is that the carriers either condone or openly endeavor to defend these inexcusable practices.

The majority have gone far to improve this situation, but not far enough. All transit should be paid for by the person for whom the service is rendered and not included, as at present, in the line-haul rate. Free transit is of no value to the producer, as practically all of it takes place after the shipment has reached the first market. It is used by the middlemen, between the producer and the ultimate consumer. Under the present theory, the cost of transit is hidden supposedly in the line-haul rate, and the person who does not use it and cares nothing about it must pay for it as much as the person who uses it 10 or more times.

It is admitted upon this record that it costs the carrier about $20 per car each time the service is rendered. It is a service of value to the person who requires it. Why should not he who uses it pay for it? This is the rule generally adopted in every other case of transit save grain. It is a sound principle economically, and undoubtedly the present practice in grain would not exist but for the inability of traffic officials to withstand the competitive pressure.

We would not be without sound precedent if we established a universal charge on all transit sufficient to cover the actual cost plus a reasonable profit to the carrier. In a case determined in 1912, *In Re*

Transportation of Wool, Hides, and Pelts, 23 I. C. C. 151, the commission, speaking through CHAIRMAN PROUTY, after describing transit as a practice of universal prevalence, and affirming that as railroad business is now conducted, the commission could not properly supervise and regulate interstate rates and practices without authority over transit, said:

> For the granting of this privilege carriers should, however, charge a reasonable compensation. It has been the custom of railroads in many cases to give, as a part of the rate, special privileges of this kind, which were sometimes availed of and sometimes not, and it often happens that the rate itself is justified upon the ground that these privileges are allowed. Proper rate making secures to every shipper the performance of the transportation service for no more than a reasonable charge and requires of every shipper the payment for every service performed of what is reasonable.

This principle was again forcibly stated in *Mercantile Lumber Co.* v. *I. C. R. R. Co.*, 53 I. C. C. 663, wherein division 2 had under consideration a charge of 2 cents per 100 pounds for transit on lumber, and took occasion to say:

> Transit involves a service rendered to those making use of it, and the cost should be borne by them instead of by the shipping public generally. There can be no question but that defendants may exact a reasonable charge for the extra service they perform where a shipper takes advantage of the transit arrangement. It is a thing of value to the shipper and of expense to the carrier.

After all, transit is a special service very much akin to that rendered by the carriers in ordinary switching service. Within very recent times this commission, particularly division 3, has on numerous occasions considered the question of charging for switching services, and in a recent case, *Reciprocal Switching Charges*, 155 I. C. C. 450, that division said:

> Protestants' witness stated that the charges for reciprocal switching are generally established without regard to the cost for the particular service on the theory that the services are of mutual advantage to all of the carriers concerned and will be performed by all at correspondingly low charges. The fact that such charges are or are not reciprocal is unimportant, as the so-called reciprocity theory of establishing switching charges has been condemned by us in several cases. *Switching at Galesburg, Ill.*, 31 I. C. C. 294; *Switching and Absorption at Minneapolis*, 61 I. C. C. 646; *Interchange Switching at Atlanta*, 63 I. C. C. 258. Charges for switching should be sufficient to insure a proper return for the service performed.

The Supreme Court of the United States has been called upon to consider the principle herein involved in a number of cases. It will not be necessary to burden this report with more than one or two of the many. In *Southern Ry. Co.* v. *St. Louis Hay and Grain Co.*, 214 U. S. 301, the court said:

> If the stopping for inspection and reloading is of some benefit to the shipper and involves some service, but an expense to the railway company, we do not

think that the latter is limited to the actual cost of that privilege. It is justified in receiving some compensation in addition thereto.

See also *Missouri Pac. Ry. Co.* v. *State of Nebraska*, 217 U. S. 196, 206.

In fact, it may be stated as a just principle, well established by the courts, that any service rendered by a carrier should be charged for at a sum sufficient to remunerate the carrier for the service performed, and the service should not be allowed by reason of no charge, or an insufficient charge, to become a burden on other traffic. *Northern Pac. Ry. Co.* v. *North Dakota*, 236 U. S. 585, and *Norfolk & West. Ry.* v. *W. Va.*, 236 U. S. 605.

The foregoing are my major objections to the findings of the majority. There are others of a minor character, which I will not prolong this concurrence to discuss. If a report in any case of magnitude is to be adopted, there must be a yielding of individual views and mutual concessions. Believing that as to many important matters with which this proceeding is concerned it will bring about a distinct improvement in present conditions, I concur generally in the report.

I am authorized to say that COMMISSIONER TATE joins in that part of my concurring expression which deals only with the subject of transit.

LEE, *Commissioner*, concurring:

Although concurring in the adoption of the report, I disagree with a number of its features. Among these, I agree with COMMISSIONER MEYER'S views on port equalization, and with COMMISSIONER LEWIS on the subject of export rates.

AITCHISON, *Commissioner*, dissenting in part:

While concurring generally in the report, for the reasons stated by COMMISSIONER PORTER I do not concur in the removal of the differential between coarse and other grains where now existing.

Nor am I able to concur in the very summary treatment accorded complaints which seek reparation. The consideration given to them in the report is utterly inadequate. Persons who bring complaints under section 13 of the act are entitled to full and careful consideration by the commission, and to a report of the facts according to usual practice. This right should not be diminished because for convenience we force a consolidation of the complaints of individuals with a nation-wide general investigation which looks only to the future. In this case there is no discussion or weighing of the evidence as bearing upon these particular complaints—in fact, there is not even an enumeration of the complaints which seek reparation as to

which, presumably, orders of dismissal are to be entered. The least which we should do under such circumstances is to reserve these complaints for further and adequate consideration as to the reasonableness of the rates charged in the past, and not dispose of them in a manner which, while possibly a short cut for the commission, ignores the substantial rights of the parties and denies one of the elements of a hearing, due consideration of specific issues involved.

164 I. C. C.

APPENDIX A

COMPLAINT AND INVESTIGATION AND SUSPENSION PROCEEDINGS CONSOLIDATED WITH PART 7, DOCKET 17000

Some of the cases listed below were consolidated with this record for initial or further hearing. Others were separately heard and submitted. All are finally disposed of in this proceeding.

No. 16112, *Ogden Grain Exchange* v. *Abilene & Southern Railway Company et al.* Complainant alleged that the rates on grain and grain products from points in Utah and Idaho to destinations in Colorado, the lower Mississippi Valley, and other points within the scope of this proceeding, were unreasonable and unduly prejudicial, in violation of sections 1, 3, and 4 of the interstate commerce act. In our report and order therein, 122 I. C. C. 691, we prescribed, among others, reduced rates from Colorado common points to the Southwest and made the rates from Utah and Idaho fixed differentials higher than from Colorado common points. Our further order of June 24, 1927, therein postponed the effective date of the reduced base rates from Colorado common points, but made no change in the findings as to the differentials, and consolidated the case with this proceeding, for further consideration.

No. 16141, *State of Idaho ex rel. Public Utilities Commission of Idaho* v. *Oregon Short Line Railroad Company et al.* Complainant alleges that the rates charged on wheat, in carloads, shipped from producing points in Idaho, served by defendants' lines, to Portland, Oreg., for export, have been and are unreasonable and unduly prejudicial, in violation of sections 1 and 3 of the interstate commerce act. The commission is asked to prescribe just and equitable rates for the future not to exceed the rates for equal distances on the same commodity charged by other common carriers on such traffic to Portland.

No. 16294, *State of Colorado et al.* v. *Missouri Pacific Railroad Company et al.* Complainant alleges that the rates on grain and grain products, in carloads, from Denver and Colorado common points and Greeley, Colo., and points grouped therewith, to Galveston and Houston, Tex., and New Orleans, La., are unreasonable and, in comparison with the rates from Nebraska, Minnesota, and Iowa, unduly prejudicial. Complainants ask that defendants be required to establish and put in force, on the commodities and between the points heretofore described, rates and charges which the commission may deem just and reasonable.

No. 16322, *Nebraska State Railway Commission* v. *Atchison, Topeka & Santa Fe Railway Company et al.* Complainant alleges that the rates charged for the transportation of corn, in carloads, from points in Nebraska via Superior, Nebr., to destinations on the lines of the Atchison, Topeka & Santa Fe Railway Company and Missouri Pacific Railroad Company in Kansas and Oklahoma are unreasonable, in violation of section 1 of the interstate commerce act, in that they are combinations of local rates to and from Superior instead of reasonable joint through rates. The commission is asked to prescribe reasonable joint through rates for the future. The complaint was heard and a proposed report served, but subsequently the case was consolidated with this proceeding.

No. 16501, *Sioux City Grain Exchange* v. *Atlantic & Western Railway Company et al.*, and Sub-No. 1, *Board of Trade of Kansas City, Mo.* v. *Same.* Complainants allege that the rates on grain and grain products, in carloads, from points in Nebraska, Minnesota, South Dakota, and Iowa to Sioux City, Iowa, and Kansas City, Mo.-Kans., are unreasonable, and, as compared with rates from the same points to Minneapolis, Minn., Chicago, Ill., and other primary grain markets, unduly prejudicial, in violation of sections 1 and 3 of the interstate commerce act. The commission is asked to prescribe reasonable rates for the future.

No. 16612, *Superior Traffic Association* v. *Atchison, Topeka & Santa Fe Railway Company et al.* Complainant alleges that the through rates, made by combination on Superior, charged on grain and its products, in carloads, from points on defendants' lines in Nebraska to Kansas and Oklahoma are unreasonable, and, as compared with combinations on Lincoln, Nebr., and the Missouri River cities, between the same points, unduly prejudicial, in violation of sections 1 and 3 of the interstate commerce act. The commission is asked to prescribe reasonable rates for the future. This case was heard separately and a proposed report was served, but was subsequently consolidated with this proceeding.

No. 17159, and related cases, *Southern Kansas Grain & Grain Products Association* v. *Chicago, Rock Island & Pacific Railway Company.* This case was reopened for further argument in connection with this proceeding. In our original report therein, 139 I. C. C. 641, we limited the application of transit rules and proportional rates at lower Missouri River crossings, and St. Louis, Mo., and points grouped therewith, on wheat and its products originating in southern Kansas and Colorado, reshipped to interior points in Arkansas, Louisiana, and Texas, and to Gulf ports for export.

No. 17477, *St. Joseph Grain Exchange et al.* v. *Abilene & Southern Railway Company et al.* Complainants allege that, in respect of grain and grain products, the rates from Minneapolis, Minn., to St. Joseph, Mo., Atchison, Kans., and Kansas City, Mo.-Kans., are unreasonable and, in comparison with the rates from Minneapolis to St. Louis, Mo., and Cairo, Ill., unduly prejudicial; that the rates from St. Joseph, Atchison, and Kansas City to destinations in Arkansas, Kansas, Louisiana, Missouri, Oklahoma, and Texas, in comparison with the rates from Minneapolis to the same destinations, are unduly prejudicial; that on shipments from Minnesota and States north and west of Minnesota, from which no joint rates are published, to various destinations, the combinations on St. Joseph, Atchison, and Kansas City are higher than the combinations on Minneapolis, to the undue prejudice of St. Joseph, Atchison, and Kansas City, and the undue preference of Minneapolis; and that the rates from Minneapolis to destinations in Arkansas, Louisiana, and Missouri when applied through St. Joseph, Atchison, and Kansas City are unduly prejudicial to those points in comparison with lower rates applied through St. Louis and Cairo with transit; all in violation of sections 1 and 3 of the interstate commerce act. The commission is asked to establish reasonable and nonprejudicial rates for the future.

No. 17902, *Southern Kansas Millers Traffic Club et al.* v. *Abilene & Southern Railway Company et al.* Complainants allege that the rates charged for the transportation of wheat and coarse grain, and products thereof, in carloads, when shipped direct or under transit arrangements en route, from points in southern Kansas to destinations in Texas are unjust, unreasonable, and, in comparison with the rates contemporaneously maintained on like traffic from

Oklahoma, established in compliance with our order in Docket No. 12944, *Oklahoma Corporation Commission* v. *A. & S. Ry. Co.*, 101 I. C. C. 116, unduly prejudicial, in violation of sections 1 and 3 of the interstate commerce act. The commission is asked to prescribe reasonable and nonprejudicial rates for the future.

No. 17992 (Sub-No. 1), *Salina Chamber of Commerce et al.* v. *Abilene & Southern Railway Company et al.* Complainants allege that the rates charged for the transportation of wheat and coarse grains, and products thereof, in carloads, when shipped direct or under transit arrangements en route, from points in Kansas to destinations in Texas, are unjust, unreasonable, and, in comparison with rates contemporaneously maintained on like traffic from Oklahoma, established in compliance with our order in Docket No. 12944, *Oklahoma Corporation Commission* v. *A. & S. Ry. Co.*, 101 I. C. C. 116, unduly prejudicial, in violation of sections 1 and 3 of the interstate commerce act. The commission is asked to prescribe reasonable and nonprejudicial rates for the future.

No. 18208, *American Maid Flour Mills et al.* v. *Abilene & Southern Railway Company et al.* Complainants allege that rates charged for the transportation of grain and grain products, in carloads, from points in Texas and Oklahoma, via routes through Texas, to destinations in Arkansas and Louisiana are unreasonable, and, in comparison with rates from competing points in Oklahoma, unduly prejudicial, in violation of sections 1 and 3 of the interstate commerce act. The commission is asked to prescribe reasonable joint through rates for the future, subject to transit arrangements at points in Texas.

No. 18359, *Atchison Board of Trade et al.* v. *Abilene & Southern Railway Company et al.* Complainants allege that the local, proportional, and joint through rates charged for the transportation of grain and grain products, in carloads, from points in Kansas, Missouri, Nebraska, South Dakota, Minnesota, and Iowa, to all destinations in Texas are unreasonable, and, in comparison with rates from competing points in Oklahoma, Kansas, and Texas, and with rates on Texas intrastate shipments, unduly prejudicial, in violation of sections 1, 3, and 13 of the interstate commerce act. The commission is asked to prescribe reasonable and nonprejudicial rates for the future.

No. 18359 (Sub-No. 1), *Sioux City Grain Exchange* v. *Abilene & Southern Railway Company et al.* Complainant alleges that the local, proportional, and joint through rates charged for the transportation of grain and grain products, in carloads, from Sioux City and other points in Iowa, and from points in Kansas, Missouri, Nebraska, Minnesota, and South Dakota to points in Texas are unreasonable and, by comparison with rates from competing points in Oklahoma, Kansas, and Texas, and with rates on Texas intrastate shipments, unduly prejudicial, in violation of sections 1, 3, and 13 of the interstate commerce act. The commission is asked to prescribe reasonable and nonprejudicial rates for the future.

No. 18616, *Minneapolis Traffic Association* v. *Chicago, Milwaukee & St. Paul Railway Company* (*H. E. Byram, Mark W. Potter, and Edward J. Brundage, Receivers*). Complainant alleges that the failure of defendant to maintain rules and regulations providing for transit at Minneapolis, Minn., on grain and grain products, in carloads, shipped from points on defendant's lines in Washington, Idaho, Montana, North Dakota, South Dakota, Minnesota, and Iowa to Minneapolis, there milled and reshipped to Duluth, Minn., or Superior, Wis., subjects complainant's members to the payment of rates which are unreasonable and, by comparison with the transit rules and regulations accorded com-

peting shippers and millers at other points, unduly prejudicial, in violation of sections 1 and 3 of the interstate commerce act. The commission is asked to prescribe reasonable rates and transit rules for the future. Hearing was had, a proposed report issued, and the case was orally argued, but final action was withheld for consideration in connection with this proceeding.

No. 18669, *Southwestern Millers' League* v. *Atchison, Topeka & Santa Fe Railway Company et al.* Complainant alleges that the rates charged for the transportation of flour, in carloads, from points in Kansas, Nebraska, Oklahoma, Texas, and Colorado, to destinations in California are unreasonable, and, by comparison with the contemporaneous rates on wheat, unduly prejudicial, in violation of sections 1 and 3 of the interstate commerce act. The commission is asked to prescribe reasonable rates for the future.

No. 18669 (Sub-No. 1), *Globe Grain and Milling Company* v. *Atchison, Topeka & Santa Fe Railway Company et al.* Complainant alleges that the rates charged for the transportation of grain and grain products from points in Colorado, Iowa, Kansas, Missouri, Nebraska, Oklahoma, and Texas to points in Arizona, California, Nevada, and Utah are unjust, unreasonable, and, by comparison with rates from points in Colorado, Iowa, Kansas, Missouri, Nebraska, Oklahoma, and Texas, unduly prejudicial, in violation of sections 1 and 3 of the interstate commerce act. Complainant asks that the defendants be required to increase the differential between wheat and flour rates, and to establish reasonable and nonprejudicial rates for the future.

No. 18782, *New Orleans Joint Traffic Bureau* v. *Abilene & Southern Railway Company et al.* Complainant alleges that the rates charged for the transportation of grain and grain products, in carloads, from points in Colorado, Idaho, Kansas, Missouri, Nebraska, Nevada, Oklahoma, Oregon, Utah, and Wyoming to New Orleans, La., and points within the terminal district of New Orleans, are unreasonable and, by comparison with the adjustments accorded at St. Louis, Mo., East St. Louis, Cairo, and Chicago, Ill., Memphis, Tenn., and points in the States of Arkansas, Illinois, Kentucky, Mississippi, Missouri, Louisiana, Tennessee, and Texas, unduly prejudicial, in violation of sections 1 and 3 of the interstate commerce act. The commission is asked to prescribe reasonable and nonprejudicial rates for the future.

No. 18860, *Des Moines Elevator & Grain Company et al.* v. *Chicago, Burlington & Quincy Railroad Company et al.* Complainants allege that the rates charged for the transportation of grain, grain products, and related articles taking the same rates, in carloads, from Des Moines, Iowa, to destinations on the Chicago, Burlington & Quincy Railroad and the Quincy, Omaha & Kansas City Railroad, were and are unreasonable and, by comparison with rates from Council Bluffs, Iowa, and Omaha, Nebr., unduly prejudicial, in violation of sections 1 and 3 of the interstate commerce act. The commission is asked to prescribe reasonable and nonprejudicial rates for the future.

No. 18900, *Des Moines Board of Trade et al.* v. *Kansas City, Clay County and St. Joseph Railway Company et al.* Complainants allege that the rates charged for the transportation of grain and grain products, in carloads, between Des Moines, Iowa, and St. Joseph, Mo., Atchison, and Leavenworth, Kans., Kansas City, Mo.-Kans., and points in North and South Dakota, are unreasonable, and that the adjustment at Des Moines, by comparison with the adjustment at various western competing points, is unduly prejudicial, in violation of sections 1 and 3 of the interstate commerce act. The commission is asked to prescribe reasonable local and proportional rates for the future.

No. 19108, *Merchants Exchange of St. Louis* v. *Abilene & Southern Railway Company et al.* Complainant alleges that the rates charged for the transportation of grain and seed, in carloads, from points in the Panhandle of Texas and points in New Mexico to St. Louis, Mo., and East St. Louis, Ill, are unreasonable and, by comparison with rates from competing points in Missouri, Louisiana, and Tennessee, unduly prejudicial, in violation of sections 1 and 3 of the interstate commerce act. The commission is asked to prescribe reasonable rates for the future.

No. 19263, *Taylor Milling Company et al.* v. *Atchison, Topeka & Santa Fe Railway Company et al.* Complainants allege that the failure and refusal of defendants to accord transit to complainants on shipments of grain, grain products, seeds, and other commodities used in the manufacture of poultry and stock foods, moving from Los Angeles, Calif., to points in Arizona, Nevada, New Mexico, Oregon, and other States, while contemporaneously according such transit to competitors in Colorado, Nebraska, Kansas, Missouri, Oklahoma, Texas, and other States, are unduly prejudicial to complainants and unduly prefer their competitors, in violation of section 3 of the interstate commerce act. The commission is asked to prescribe reasonable and nonprejudicial transit rules for the future.

No. 19279, *Board of Trade of Cairo, Ill.*, v. *Arkansas & Louisiana Missouri Railway Company et al.* Complainant alleges that the rates charged for the transportation of grain and grain products, in carloads, from points in Illinois to points in Louisiana are unreasonable and, by comparison with rates from points in Iowa, Minnesota, South Dakota, North Dakota, Nebraska, Kansas, and Colorado, and from Kansas City, Mo.-Kans., Omaha, Nebr., Des Moines, Iowa, and other markets, as well as from certain points in Illinois, including Cairo, unduly prejudicial, in violation of sections 1 and 3 of the interstate commerce act. The commission is asked to prescribe reasonable and nonprejudicial rates for the future.

No. 19453, *Lucius P. Cook et al.* v. *Chicago, Rock Island & Pacific Railway Company et al.* Complainants allege that the rates charged for the transportation of grain and grain products from points in Colorado, Missouri, and Kansas to Memphis, Tenn., when destined to Nashville, Tenn., and directly intermediate stations on the lines of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis railways, and the failure of defendants to accord transit at Memphis, are unreasonable and, by comparison with the adjustment accorded complainants' competitors at St. Louis, Mo., and Cairo and East St. Louis, Ill., unduly prejudicial, in violation of sections 1 and 3 of the interstate commerce act. The commission is asked to prescribe reasonable rates to and transit rules at Memphis.

No. 19620, *Board of Railroad Commissioners of the State of Iowa* v. *Atchison, Topeka & Santa Fe Railway Company et al.* Complainant alleges that the rates charged for the transportation of coarse grain from Iowa to the north Pacific coast are unreasonable and unjustly discriminatory, in violation of sections 1 and 2 of the interstate commerce act. The commission is asked to prescribe reasonable rates for the future.

No. 19749, *Light Grain & Milling Company* v. *Atchison, Topeka & Santa Fe Railway Company et al.* Complainant alleges that the rates charged for the transportation of wheat and coarse grains and the products thereof from points in Kansas and Oklahoma to various points in New Mexico are unreasonable and unduly prejudicial, in violation of section 1, and the long-and-short-haul clause of section 4, of the interstate commerce act. The commission is asked to prescribe reasonable rates for the future and to award reparation, including

reparation on shipments moving during the pendency of this proceeding. The parties agreed to submit this case upon the record in this proceeding, with a reservation as to reparation.

No. 19842, *State of North Dakota, Doing Business as The North Dakota Mill and Elevator Association, et al.* v. *Ahnapee & Western Railway Company et al.* Complainants allege that the rates charged for the transportation of grain from points in Montana and North Dakota to the North Dakota Terminal at Grand Forks, N. Dak., there cleaned and milled in transit and reshipped to Chicago, Ill., New York, N. Y., and other eastern destinations, are unreasonable and, by comparison with the adjustment at grain terminals at Minneapolis and Duluth, Minn., Buffalo, N. Y., and other points, unduly prejudicial; that the exaction of a charge for transit at the North Dakota Terminal while according free transit at Great Lakes terminals is unreasonable and unduly prejudicial; that the rates on wheat and coarse grains from points in Montana to the North Dakota Terminal are unreasonable and, by comparison with the rates to Minneapolis, St. Paul, Duluth, and other points, unduly prejudicial; all in violation of sections 1, 2, 3, and 4 of the interstate commerce act. The commission is asked to prescribe reasonable and nonprejudicial through rates and transit rules for the future.

No. 20071, *Delmar Company et al.* v. *Chicago, Milwaukee & St. Paul Railway Company (H. E. Byram, Mark W. Potter, and Edward J. Brundage, Receivers).* Complainants allege that the charges collected for the storage in transit at Minneapolis, Minn., of grain forwarded from and to various interstate destinations on the lines of defendant were and are unreasonable, in violation of section 1 of the interstate commerce act. The commission is asked to prescribe reasonable rates for the future and to award reparation. This case was assigned for hearing, but upon agreement of the parties was submitted upon the record as made in No. 18616, which was consolidated with this proceeding.

No. 20115, *Oklahoma City Mill & Elevator Company et al.* v. *St. Louis-San Francisco Railway Company et al.* Complainants allege that the rates charged for the transportation of grain and grain products, in carloads, from points in Oklahoma to destinations on the line of the Missouri & North Arkansas Railway Company are unreasonable, in violation of section 1 of the interstate commerce act. The commission is asked to prescribe reasonable rates for the future and to award reparation.

No. 20298, *Texas Wheat Growers Association* v. *Southern Pacific Company et al.* Complainant alleges that the rates charged for the transportation of grain and grain products, in carloads, from stations on the line of the Southern Pacific Company, Bascom to Dawson, N. Mex., inclusive, to stations in the State of Texas, are unreasonable and, by comparison with the rates on the same commodities from Kansas City, Mo., unduly prejudicial, in violation of sections 1 and 3 of the interstate commerce act. The commission is asked to prescribe reasonable rates for the future and to award reparation. This case was assigned for hearing, but upon agreement of the parties was submitted upon the record in this proceeding.

No. 20474, *Fisher Flouring Mills Company et al.* v. *Union Pacific Railroad Company et al.* Complainant alleges that the rates charged for the transportation of grain, in carloads, from points in southern Idaho on the Union Pacific and the Oregon Short Line Railways to Seattle, Wash., are unreasonable and, by comparison with rates from the same origins to Portland, Oreg., unduly prejudicial, in violation of sections 1, 2, and 3 of the interstate commerce act. The commission is asked to prescribe reasonable rates for the future and to award reparation.

No. 21079, *Albers Milling Company* v. *Atchison, Topeka & Santa Fe Railway Company et al.* Complainant alleges that the rates charges for the transportation of cereals and cereal products, in carloads, from Oakland, Calif., and other California points to various destinations in Utah, Wyoming, Idaho, and Montana are unreasonable, in violation of section 1 of the interstate commerce act. The commission is asked to prescribe reasonable rates for the future and to award reparation. At the hearing complainant waived its claim for reparation.

No. 21108, *Texas Wheat Growers Association* v. *Atchison, Topeka & Santa Fe Railway Company et al.* Complainant alleges that the rates charged for the transportation of grain and grain products, in carloads, from various points of origin on the line of the Panhandle & Santa Fe Railway in Texas to Galveston, Tex., are unreasonable and unduly prejudicial, in violation of sections 1 and 3 of the interstate commerce act. The commission is asked to prescribe reasonable rates for the future and to award reparation, including reparation on shipments moving during the pendency of this proceeding. The parties agreed to submit the issue as to rates upon this record, but reserved the issue as to reparation for later determination.

In I. and S. No. 2469, and related cases, there were proposals to materially revise rates on grain and grain products from, to, and between points in Illinois, Iowa, Minnesota, North Dakota, South Dakota, and Wisconsin, and in the report therein, *Grain and Grain Products*, 122 I. C. C. 235, the issues were reserved for disposition in this proceeding.

I. and S. Docket No. 2735, *Transit Provisions on Grain and Related Articles Destined to Duluth, Minn., and Related Points*, proposes changes in the provisions for transit on grain and grain products, in carloads, from points in Washington, Idaho, Montana, North Dakota, South Dakota, Minnesota, and Iowa to Duluth, Minn., and related points. The schedules were suspended by order of August 21, 1926, and voluntarily postponed further by the carriers. The case was consolidated with No. 18616, hearing was had, and a proposed report prepared.

I. and S. Docket No. 2956, *Grain Products Between Points in Western Trunk-Line Territory*, proposes increased rates on grain products between points in western trunk-line territory.

I. and S. Docket No. 3046, *Grain from Montana to Duluth, Minn., and Superior, Wis.*, proposes changes in rates on grain from points on the Northern Pacific Railway in Montana to Duluth, Minn., and Superior, Wis., via Minneapolis, Minn. Protestants object to the alleged proposed assessment on cars forwarded from Minneapolis to Duluth, in the original car and on the original waybill, of a charge additional to that for reconsignment or diversion. The schedules carrying the increased rates were suspended by order of January 10, 1928, and voluntarily postponed further by the carriers.

I. and S. Docket No. 3089, *Proportional Rates on Grain and Grain Products from Omaha and Group to Duluth and Points Taking Same Rates*, proposes changes in proportional rates on grain and grain products from Omaha, Nebr., and points taking the same rates, to Duluth, Minn., and points grouped therewith. Protestants allege, among other things, that the maintenance of the same rates from Omaha and other Missouri River points to Duluth and Chicago, Ill., permits the Minneapolis market to compete on an equal basis with Chicago, Kansas City, and other points, and that the proposed changes will lessen this opportunity. The proposed schedules were suspended by order of April 4, 1928, and the case was submitted without hearing on the record in this proceeding.

I and S. No. 3278, *Grain and Related Articles Between Points in Kansas, Missouri, and Arkansas*, proposes changes in rates on grain and related arti-

cles between points in Kansas, Missouri, and Arkansas. The schedules were suspended by order of April 13, 1929, and voluntarily further postponed by the carriers. A scheduled hearing was canceled upon agreement of the parties to submit the case upon this record.

In I. and S. No. 3293, *Transit Provisions on Grain and Related Articles Destined to Duluth, Minn., and Related Points*, the Minneapolis Traffic Association protests changes in rules and regulations governing transit on grain and grain products, in carloads, at points on respondent's lines, when destined to Duluth, Minn., and related points. The proposed schedules were suspended by order of May 16, 1929.

APPENDIX B

List of Commodities Taking Grain-Products Rates

Barley
Barley, cracked
Barley, flaked
Barley, pearled
Barley, roasted
Barley, rolled
Barley-oats mixture
Beans:
- Castor
- Mesquite
- Soy or soya
- Velvet

Bran:
- Corn
- Rice
- Wheat

Buckwheat
Burrs, cotton boll
Cake:
- Copra
- Cottonseed
- Oil
- Palm kernel
- Peanut
- Sesame seed
- Soya bean
- Sunflower seed
- Velvet bean

Cereal food preparations, not otherwise indexed by name in current western classification (cracked, ground, granulated, hulled or rolled cereals for human consumption, cooked or uncooked)
Cerealine
Chaff, barley
Chops:
- Barley
- Corn
- Feterita
- Kaffir corn
- Milo maize
- Oat
- Sorghum head or sorghum grain chops, made from sorghum grain in the head
- Wheat

Clippings, oat
Corn
Corn, cracked
Corn, crushed
Corn, ground
Corncobs, ground
Cowpeas
Durra (Jerusalem corn)
Dust:
- Grain
- Elevator

Emmer
Farina
Farinose
Feed:
- Alalfa
- Animal, poultry, or pigeon, prepared (not condimental nor medicated)
- Barley, ground
- Barley-hay feed
- Bean-straw feed
- Buckwheat (bran and middlings
- Clover or sorghum
- Corn, ground

LIST OF COMMODITIES TAKING GRAIN-PRODUCTS RATES—Continued

Feed—Continued.
Gluten
Gluten meal
Grain, not otherwise indexed by name in current western classification
Hominy
Oat
Rye, ground
Straw by-product
Wheat, ground
Yucca, ground
Feterita
Flakes:
Brewers'
Corn
Cottonseed hull
Hominy
Oat
Flaxseed
Flour:
Buckwheat
Corn
Malt
Mixed grain
Rye
Sorghum
Spelt or spelz
Flour manufactured from beans, potatoes, or wheat; or flour manufactured from a mixture of any two or more of such articles; or flour manufactured from any one or more of such articles with one or more of the following articles:
Barley, feterita, kaffir corn, milo maize or oats, grain flour not otherwise indexed by name, or blends of grain flours with cereal flours, not including fruit or vegetable flour
Flour manufactured from barley, feterita, kaffir corn, milo maize, or oats, or flour manufactured from a mixture of any two or more of such articles
Germs, corn
Grain, brewers' (by-products of barley)
Grain, brewers' dried
Grain, sorghum (milo maize, kaffir corn, hegari or higera, dorso or feterita, shalla)
Grain, spent (dried or wet)
Grits (grain or cereal)
Grits, brewers' (including brewers' refined grits)
Groats, oat
Hominy
Hominy, pearl
Hulls:
Barley
Buckwheat
Corn
Cottonseed, ground or unground
Cotton boll
Oat
Peanut, ground,
Rice
Kaffir corn
Kaoliang
Maizea
Malt
Malt, flaked
Mazam
Meal:
Alfalfa
Barley
Bean straw
Bran
Brewers
Cactus, ground
Copra
Corn
Corn cob
Corn germ
Corn oil cake
Cottonseed
Feterita
Gluten
Hominy
Kaffir corn
Linseed
Mesquite
Milo maize
Oat
Oil cake
Palm kernel
Peanut

LIST OF COMMODITIES TAKING GRAIN-PRODUCTS RATES—Continued

Meal—Continued.
- Rice, mixture of rice bran and rice polish
- Sesame seed
- Sorghum
- Sorghum pulp
- Soya bean

Sugar beet
- Sunflower seed
- Velvet bean

Middlings
Millstuffs
Milo maize
Needles, barley
Offal, oat
Oats
Oats, cracked
Oats, ground
Oats, mill (containing more than 30 per cent of wheat)
Oats and barley blended
Pulp, dried beet
Pummies, ground or unground
Refuse, brewers'
Refuse, flour or mill
Refuse, malters'
Rice polish
Rye
Rye, cracked
Rye, crushed
Rye, rolled
Screenings:
- Bean
- Grain
- Paddy rice
- Pea

Skimmings, barley or grain (malt house)
Skimmings, rye
Seed:
- Broomcorn
- Cane
- Flax
- Hemp
- Hungarian
- Melilotus
- Millet
- Sorghum
- Sudan grass
- Sunflower
- Vetch
- Wild mustard

Shipstuffs
Shorts
Spelt or spelz
Sprouts:
- Barley
- Rye
- Malt

Wheat, whole
Wheat, cracked
Wheat, crushed
Wheat, flaked
Wheat, granulated
Wheat, pearl
Wheat, rolled

APPENDIX C

SUMMARY OF EVIDENCE RELATING TO THE ECONOMIC CONDITION OF THE GRAIN FARMER

The record in this case contains a comprehensive discussion of the economic condition of the producers of grain in western territory. Some 140 economic witnesses were heard, besides many who testified on grain rates and related subjects. In an effort to shorten the time required for taking this testimony, we invited, through proper State or Federal authorities, other witnesses capable of giving us the benefit of their special knowledge of agricultural conditions. Fourteen such additional witnesses appeared.

In the following pages appears a digest, under appropriate heads, of pertinent parts of this economic testimony, together with interpretations of its significance. Some of the statistics to be examined do not bear directly on the issues in this case, but presumably were presented to throw light on the general agricultural situation.

It has been deemed desirable in some instances to supplement the record by adding to Government statistical series, put in at the hearings, data for subsequent periods which have since become available. These have been taken from the same Government sources and in no case extend beyond the time of the closing of the hearings.

GENERAL DESCRIPTION OF THE GRAIN-GROWING INDUSTRY

The relative importance of the several leading grains, measured by volume of production and shipment, is indicated in the table below.

Five leading grains, production and shipments out of county where grown, average 1922–1926

	Production	Shipments	Per cent shipped
	Bushels	*Bushels*	
Wheat:			
24 western States	651, 894, 000	481, 582, 000	73.9
United States	807, 648, 000	554, 512, 000	68.7
Corn:			
24 western States	1, 822, 542, 000	396, 680, 000	21.8
United States	2, 766, 197, 000	510, 133, 000	18.4
Oats:			
24 western States	1, 051, 942, 000	279, 214, 000	26.5
United States	1, 353, 101, 000	338, 164, 000	25.0
Barley:			
24 western States	180, 530, 000	66, 082, 000	36.6
United States	193, 814, 000	66, 769, 000	34.5
Rye:			
24 western States	39, 917, 000	25, 278, 000	63.3
United States	53, 756, 000	28, 815, 000	53.6

There are well-defined areas in the production of wheat in western territory. The spring-wheat area embraces, in the order of the importance of their 1927 acreage, North Dakota, Montana, South Dakota, and Minnesota, with Washington, Idaho, and other States of less importance. Included in the spring-wheat area is that devoted to durum wheat, in whose production North Dakota leads, followed at a great distance by South Dakota and Minnesota. Kansas leads in hard winter-wheat acreage and is followed by Oklahoma, Nebraska, Texas, Colorado, Washington, and Oregon. Soft winter wheat is produced extensively in Illinois and Missouri, of the States of the western district.

Wheat acreage has shown a tendency to expand in recent years, particularly in parts of Montana, North Dakota, Nebraska, Colorado, Kansas, Oklahoma, and Texas. The States in which increases have occurred are those in which newer methods of production, particularly the combine and the tractor, have recently come into use, making it possible in some cases to use for crop purposes lands which had hitherto been devoted to livestock production.

Corn production is concentrated largely in the so-called Corn Belt, where Iowa leads, followed by Nebraska, Illinois, Missouri, Kansas, South Dakota, and Minnesota. Texas and Oklahoma, in the Southwest, are also large producers of corn.

The acreage of oats in 1927 was greatest in Iowa, followed by Minnesota, Illinois, South Dakota, Nebraska, Wisconsin, and Texas.

In the case of barley, North Dakota leads, followed by Minnesota and South Dakota, and then, at some distance, by such States as Wisconsin, Illinois, Iowa, Kansas, and Colorado. On the Pacific coast California is a large producer.

North Dakota is the only State with a large acreage of rye. Also of some importance in rye production are Minnesota, Nebraska, and Wisconsin.

RETURN FROM FARMING OPERATIONS

Testimony as to the return earned by agriculture relates (1) to the gross return from farming operations as a whole, from crops alone, or from a particular kind of crop; (2) to the net return, variously stated, from farming operations as a whole; and (3) to comparisons of production costs and selling prices per acre or per bushel.

Gross income from farm production has been estimated as shown below in the years for which information is available. This figure is derived by deducting from gross value of all farm production those portions of crops and dairy products fed to livestock or used for seed, and waste. Income includes the value of food and fuel consumed on the farm, which has varied since 1920 from 20 to 23 per cent of the total, but it does not include depreciation or appreciation in inventories of capital investment or of farm products.

1919–20	$15,719,000,000	1924–25	$12,008,000,000
1920–21	12,068,000,000	1925–26	12,670,000,000
1921–22	9,214,000,000	1926–27	12,127,000,000
1922–23	10,366,800,000	1927–28	12,258,000,000
1923–24	11,288,000,000		

These figures, which were introduced by several witnesses, cover the entire United States and include branches of agriculture which are not in issue in this case. Barring the decline of 4.3 per cent from 1925–1926 to 1926–1927, agricultural income as a whole has shown slow but substantial improvement over the lowest year, 1921–1922, though all subsequent years have fallen below the first or a year of high prices.

A means of comparing farm returns for a longer period of years than that shown above is found in the statistics of value of farm production. These are available for the calendar years 1909 to 1926 and can be summarized as follows:

Period	Value of crops not fed to livestock	Value of animal products	Total
1909–1913	100.0	100.0	100.0
1914–1920	188.0	169.9	178.7
1921–1923	155.7	157.8	156.7
1924–1926	174.6	179.2	176.9

It will be seen that the value of crops in 1924–1926 had attained 93 per cent of the 1914–1920 value and that of livestock, had gone 5.4 per cent above the 1914–1920 average.

Turning now to the grains alone, the gross income from them has been as follows in the years indicated:

1919–20	$3,005,000,000	1924–25	$1,842,000,000
1920–21	2,246,000,000	1925–26	1,594,000,000
1921–22	1,286,000,000	1926–27	1,455,000,000
1922–23	1,393,000,000	1927–28	1,636,000,000
1923–24	1,398,000,000		

The drop in income from grains as a whole after 1920 is clearly marked. Improvement set in in 1922–23 and continued throughout 1924–25, since when there have been two successive declines and then a partial recovery. The 1927–1928 income is 29 per cent above that of 1921–1922 but 27 per cent below that of 1920–1921 and 46 per cent below that of 1919–1920. Again the showing is for the entire United States and comparable pre-war data are not available. Climatic and other factors affecting crops have had much to do with the results, and changes in acreage must be considered.

To approach more closely to the major issues in this case, the following data relating to gross return from wheat alone have been computed from information of record. These relate to the particular States in which wheat represented, on the average of the years 1921–1925, 10 per cent or more of the farm sales. For Kansas and Oklahoma data are not of record for the year 1927–1928. Changes in income are here related to changes in acreage. Acreage figures are acreage harvested; allowance must be made for the effects of climatic factors. The years from 1909 to 1928 have been grouped into a base period of five years, a war and immediate post-war period of six years, and two periods of four years each thereafter.

Index of wheat income and wheat acreage (1909–10 to 1913–14=100)

State		Average, 1909–10 to 1913–14	Average, 1914–15 to 1919–20	Average, 1920–21 to 1923–24	Average, 1924–25 to 1927–28
North Dakota:					
	Income	100.0	168.1	137.4	200.6
	Acreage	100.0	95.9	114.2	115.9
Montana:					
	Income	100.0	320.2	419.0	629.7
	Acreage	100.0	360.4	571.7	638.1
Washington:					
	Income	100.0	154.9	156.2	133.7
	Acreage	100.0	90.2	112.6	93.1
Idaho:					
	Income	100.0	288.8	310.0	313.8
	Acreage	100.0	162.7	228.3	207.5
South Dakota:					
	Income	100.0	219.9	100.3	118.4
	Acreage	100.0	98.1	80.7	67.4
Oregon:					
	Income	100.0	198.2	219.1	186.4
	Acreage	100.0	119.1	140.8	127.2
Nebraska:					
	Income	100.0	202.3	165.2	164.9
	Acreage	100.0	113.7	126.3	105.5
Colorado:					
	Income	100.0	289.1	200.0	285.9
	Acreage	100.0	191.9	367.0	330.7
Kansas:					
	Income	100.0	280.2	238.6	[1] 269.3
	Acreage	100.0	143.1	169.4	[1] 170.4
Oklahoma:					
	Income	100.0	462.6	368.3	[1] 469.1
	Acreage	100.0	224.6	242.3	[1] 260.3
United States:					
	Income	100.0	227.6	164.5	174.2
	Acreage	100.0	[2] 122.5	131.0	116.7

[1] Average, 1924–25 to 1926–27.

[2] In peak year, 1919–20, 160.7.

In all of the States except Montana, income from wheat increased in considerably greater measure than acreage in the period from 1914 to 1920. In three of the States acreage harvested declined while income advanced. In Montana, acreage increased 260.4 per cent and income 220.2. For the United States as a whole, acreage increased 22.5 per cent and income 127.6 per cent.

In the next period of four years acreage increased in each of the States except South Dakota, and income also increased, though not proportionately, in Montana, Idaho, and Oregon and to a minor extent in Washington. In the remaining States income declined, and in the United States as a whole a 6.9 per cent increase in acreage was accompanied by a decline of 27.7 per cent in income. Comparing this with the pre-war period, it will be noted that in every State except Montana and Colorado income showed a relatively greater increase than acreage.

Acreage generally tended to decline in the last 4-year period, the only exceptions being Montana and Oklahoma, and to a minor extent North Dakota and Kansas. The period differs here from that covered in an earlier reference to recent increase of acreage. For the country as a whole, acreage declined 10.9 per cent and income increased 5.9 per cent. Declines in income in Washington and Oregon largely offset the noticeable increases in States such as North Dakota, Montana, Oklahoma, and Colorado.

Summarizing, it may be said that wheat production yielded in the period from 1914 to 1920 exceptionally high gross returns, that acreage continued to expand in the period following while income declined, and that in the final period acreage declined 11 per cent while income advanced 6 per cent. In the 1920–1924 period, 25.6 per cent more income was obtained from each acre than in the pre-war period; in the final period, 49.8 per cent more. The latter figure is, however, an average of 69.6 per cent in the exceptional year 1924–25, and of 90, 41.1, and 39 per cent in the years following.

No account has yet been taken of the increase in costs, other than acreage costs, compared with the pre-war period. Some importance should also attach to the fact that when prices rise the poorer grades of land are called into use and that these are the lands first to go out of use when prices fall.

The next step in showing the earnings of agriculture is the derivation of net return from gross income. The calculations of the United States Department of Agriculture are most commonly cited. The following percentage return is found on the current value of all capital invested in agriculture and of the operator's net investment:

Year	Return on total capital investment	Return on net capital investment	Year	Return on total capital investment	Return on net capital investment
[illegible]	6.3	8.1	[illegible]	4.4	4.2
[illegible]	1.1	—4.2	[illegible]	5.3	4.3
[illegible]	3.3	—2.1	[illegible]	4.3	3.9
[illegible]	3.3	1.3	[illegible]	4.6	3.4
[illegible]	2.9	1.6			

[illegible] figure is low owing largely to deflation and also owed to management.

These calculations require considerable explanation. Net income represents [illegible] value of gross income after payment for hired labor and purchased [illegible], seeds, and fertilizers, after the deduction of a calculated cost of the [illegible] use of machinery, [illegible] equipment, and an allowance at current wages [illegible] the work of the farmer and his family. Credit is not made for the [illegible] of the farm dwelling, but it is treated by some, the inclusion of food produced and consumed on the farm at farm prices substantially the farmer's return in addition to that on the city dweller. The calculations as a whole rest in considerable part on assumption, hence their value is principally in what they may reveal as to trends of earnings.

The decline after 1919-1920 was of a severe character, but there has been substantial recovery from the low point of 1920-1921. The falling off in 1926-1927 was partly made up in the year following. It is to be remembered, of course, that these returns are computed on a declining value of farm investment. The decline in the period covered in the value of all farm capital was 26.5 per cent and in operator's net investment, 31.6 per cent. Witnesses responsible for the calculation were not able to state to what extent the reduction in values was real and to what extent fictitious. In so far as agricultural property values were increased by inflation not accompanied by change of ownership the return on investment in the first year shown is considerably understated and similarly, but in less degree, in the years immediately following. In view of the stability of land values shown in the last five years, the return then earned may be said to be on approximately a deflated basis. It has ranged from 2.9 to 4.3 per cent on the operator's net investment, a return after allowance for all operating expenses, including depreciation and a wage return for the farmer and his family, interest paid others, taxes, etc. The consumption of food and fuel on the farm has been taken into account, but not the annual value of the use of the farm dwelling.

These calculations relate to agriculture as a whole and cover all parts of the country. Comparison in this form with pre-war returns is not possible from the record. One witness, speaking of Nebraska, generalized to the effect that, after allowing for wages and management, the farmer's net return never had been 5 per cent, except in 1919, when 6 per cent was earned. The return shown above for the high year 1919-1920 was 6.8 or 6.7 per cent, according to whether it is reckoned on the basis of total capital invested in agriculture or the operator's net investment. Capital investment was, however, considerably inflated at this time, resulting in an understatement of the rate of return actually earned by the majority of farmers. It is, moreover, a matter of general knowledge, and was also testified by some witnesses, that the farmer during the long period of rising land values before the war took a part of his return in the form of the increased value of his principal capital asset.

Net return is also stated in terms of income to the average farmer for labor and management. Deducting interest at 4.5 per cent (which may or may not be low according to what a "normal" return is) on the current value of the farmer's net capital investment, the following amounts remain as return for labor and management:

1919-20	$917	1924-25	$624
1920-21	307	1925-26	690
1921-22	270	1926-27	698
1922-23	440	1927-28	667
1923-24	583		

There appears to have been a stabilization in the last four years shown at a point roughly 30 per cent below that of 1919-20, the first year for which this information is obtainable. Allowing $60 per annum, a figure which is clearly too low, as the value of the use of the farm dwelling, the figure last shown above is 28 per cent below the first figure, similarly increased, while the wages of farm hands are 16 per cent below and of factory employees 2 per cent above. It is to be noted that wholesale prices in the calendar years 1926 to 1927 were approximately a third lower than in the calendar year 1920, and the weighted-average price of commodities purchased by the farmer for living and production, 24 per cent lower. On the other hand, there has been an increase in the efficiency of farm operations in the period reviewed. Variations in climatic conditions also must be taken into account.

1847. D. C.

The United States Department of Agriculture also makes a calculation of net return per farm in which cash items are segregated from others. The general trend revealed is similar to that indicated in the series referred to above. Based on special returns to the department (for some 13,475 farms in all parts of the country in 1928), these calculations, on examination in detail, serve to indicate how important are size of farm and efficiency of operation in the determination of the return earned. The return on capital for capital and management in the case of these farms may be shown for sections of the country in issue in this proceeding:

Year	West north central	South central	Western	United States
1922	2.8	5.0	1.6	3.0
1923	1.7	3.8	2.5	2.3
1924	3.4	6.4	3.5	4.0
1925	4.0	4.3	5.9	4.6
1926	2.8	6.0	4.6	3.9

Calculations generally similar in character to those of the Federal department were put in as representative of the conditions in a number of States. Discussion of only one of these is possible here. This relates to the nine northwestern counties of Oklahoma, more than half the area of which is stated to be devoted to wheat production. After the deduction of 4.5 per cent on the deflated value of farm properties, the labor return per farm was obtained, of which the following unweighted averages are useful summaries:

Average 1915–1920	$903	Average 1921–1923	$24
Average 1918–1920	1,058	Average 1924–1927	643
Average 1921–1927	378		

Crop conditions have varied considerably in the period covered. No allowance is made for the use of the farm dwelling and certain assumptions and apportionment are possibly subject to question.

For these same counties there is given the return earned on farm investment, after allowing the farmer wages at current rates. An unweighted average shows that the return from 1915–1920 was 6.5 per cent and from 1921 to 1927, 2.8 per cent. From 1921–1924 it was 0.85 per cent and from 1925–1927, 5.37 per cent. An exceptional crop was enjoyed in 1926.

Numerous comparisons were made of the return earned by agriculture with that earned by railroads and industrial corporations. Such comparisons are inherently difficult to make and, in the present state of our knowledge of industrial earnings, are of little practical significance. The record may be said to indicate that agriculture has received a considerably smaller return in the years since the war than certain industries. It will not, however, support a conclusion as to how agricultural earnings compare with those of industries in general.

In this connection it is to be borne in mind that farming does not experience such a heavy percentage of failures as other lines of enterprise, such as manufacturing and retailing. Evidence of this can be found by observing the changes which occur among the retail establishments of a city block and comparing these with the number of failures in the same period for an equal number of farmers. A number of witnesses discussed these features. Statistically, the difference can be measured by comparing farm and other bankruptcies, allowing, however, for the fact that not all farm failures take the form of bankruptcy. On the average of the years 1910–1914, there were 8.2 failures per 1,000 business

enterprises and approximately 0.136 per 1,000 farmers; in the years 1922–1926, 9.2 and 1.02, respectively.

The third class of testimony offered in proof of the earnings of agriculture consists of comparisons of production costs and receipts per acre or per bushel. Both shippers and carriers introduced testimony of this character.

The shortcomings of this type of evidence have been pointed out in earlier reports (83 I. C. C. 105, 111). Its inherent defects arise from the necessity of apportioning a large part of the expense items, particularly the farmer's time, between various operations, and of placing reasonable amounts against such non-cash charges as feed produced on the farm and depreciation. The noncash items make up a considerable part of the aggregate of reported costs. Moreover, the method requires the use of an extremely small sample, since farmers generally do not and will not keep the necessary records. Sound generalization from the results thus achieved is therefore very difficult.

The cost studies of the United States Department of Agriculture, conducted in cooperation with State agencies, have the merit of being made on a uniform basis. The results for a few of the States most representative of the several classes of grain may be taken from this source.

Cost factors in amounts per acre

	Year	Net cost of production, including land rent	Receipts	Gain [1]	Land rent	Available for investment
Wheat:						
Kansas	1923	$15.69	$11.83	$3.86	$4.10	$0.24
Do	1924	16.79	21.76	4.97	4.39	8.36
Do	1925	15.37	16.28	0.91	4.13	5.04
North Dakota	1923	12.68	7.74	4.94	2.49	−2.43
Do	1924	14.37	20.16	5.79	2.62	8.41
Do	1925	15.05	18.24	3.29	2.80	6.09
Oklahoma	1923	13.53	10.80	2.73	3.13	0.40
Do	1924	15.58	19.38	3.80	3.37	7.17
Do	1925	13.90	14.60	.70	3.37	4.07
Montana	1923	17.48	13.13	4.35	3.33	−1.02
Do	1924	16.73	19.84	3.11	3.62	6.73
Do	1925	16.16	19.46	3.30	3.48	6.78
Washington	1923	27.06	22.64	4.42	9.08	4.66
Do	1924	26.17	23.55	2.62	0.63	8.01
Corn:						
Iowa	1923	24.00	28.82	4.43	8.57	13.00
Do	1924	24.87	39.99	15.12	8.71	23.83
Do	1925	26.18	21.28	4.90	8.97	4.07
Nebraska	1923	17.10	18.55	1.45	4.91	6.36
Do	1924	17.06	22.75	5.69	5.13	10.82
Do	1925	16.62	18.30	1.68	5.12	6.80
Minnesota	1923	22.18	23.79	1.61	4.88	6.49
Do	1924	22.49	24.85	2.76	5.27	7.43
Do	1925	23.56	21.28	2.27	5.14	2.87
South Dakota	1923	17.56	18.20	0.68	3.47	4.13
Do	1924	16.36	18.40	2.04	3.51	5.55
Do	1925	16.36	12.60	3.76	3.78	0.02
Oats:						
Iowa	1923	17.23	14.80	2.43	7.60	5.17
Do	1924	18.77	19.36	0.59	7.85	8.44
Do	1925	18.84	14.08	4.76	8.05	3.29
Minnesota	1923	17.14	13.94	3.20	4.63	1.43
Do	1924	18.26	19.78	1.52	5.05	6.57
Do	1925	17.73	14.57	3.16	4.75	1.59
South Dakota	1923	15.01	11.47	3.54	3.43	−0.11
Do	1924	14.37	15.20	0.83	3.52	4.35
Do	1925	14.75	10.03	4.72	3.72	−0.98
Nebraska	1923	14.00	12.24	1.76	4.04	2.28
Do	1924	16.12	13.76	2.36	5.26	2.90
Do	1925	14.75	10.08	4.67	5.13	0.46

[1] Italic figures indicate "loss."

The period covered in the foregoing table is a very limited one. Comparable figures are not available for the earlier post-war years, and those for subsequent years are incomplete. Later developments will be traced from the record by other indexes of agricultural conditions.

It should be recognized at the outset that the farms reporting these returns are above the average in both producing and marketing efficiency. On the other hand, the costs shown include all labor costs, those attributable to the farmer himself among them, and also a charge for the use of the land and its appurtenances reckoned on a cash-rental basis. A "gain" therefore would signify that, after being paid current wages for his time and receiving a designated return on his investment, the farmer has a surplus available for additional return on his property or for management; a "loss" would signify failure to remunerate fully either the farmer's labor or his investment or both.

In the case of wheat, 1923 was for all States of record, except New Mexico, one of losses in the sense indicated. However, in some of the States the value per acre sufficed to pay all operating costs and a partial return on the land. Thus the land rent in Washington is computed in that year at $9.08 an acre; deduction of this leaves other costs of $17.98, which are $4.66 less than the revenue received. In North Dakota and Montana, however, costs without the land return exceeded the reported receipts.

The year 1924 was a better one from the point of view of both production and price and in all the States of record except Washington and two minor wheat-producing States, yielded a return over both labor and land costs. In some instances the gain was very material. In 1925 the gains, in this special sense, were generally less than in 1924 but they were substantial.

The combined returns for Kansas, Missouri, and Nebraska show an increase from 1913 to 1926 of 22 per cent in the cost of producing an acre of wheat, exclusive of land rent, and an increase of 49 per cent in the acre value of wheat. Stated in bushels, the increases were 29 and 56 per cent, respectively. Farm property values in these States increased 27 per cent from 1910 to 1925, the census years, which appears to signify that the margin remaining for return on investment was proportionately as great in these States in 1926 as it was in 1913. There was, however, a greater mortgage indebtedness against farm properties in the latter year.

The only other cost study of record which provides pre-war data is one introduced for Montana, of which the following is a summary:

	1908–1914	1921–1924	1925	1926
Cost per acre	$12.33	$16.32	$16.16	$16.73
Value of wheat per acre	$19.86	$14.21	$19.46	$14.56
Yield per acre (bushels)	24.80	14.10	14.00	13.00

The decline in yield per acre clearly is a large factor in the wheat situation of Montana.

Corn seems to have had good years in 1923 and 1924 and a poorer year in 1925. Oats yielded even in 1923 a return sufficient to cover operating costs and to leave in three of the four States named amounts ranging from $1.43 to $5.17 per acre applicable for land return and management, though in South Dakota the return failed by $0.11 per acre to cover the operating costs. The year 1924 was considerably better but 1925 was generally below 1923.

Numerous individual farmers testified along one or more of the three lines under which the return from farm operations is being considered. Testimony

of this character is difficult to appraise. It is not collected on a uniform basis; it depends on the keenness and accuracy of observation of the individual witness; it involves use of scattered samples of extremely small size whose representativeness is difficult to establish; and frequently in this case is based on operations as a whole, including livestock and field crops other than grain. In many respects there was a failure on the part of the contending parties to produce witnesses from the same sections. Special difficulties arise in interpreting the testimony of nearly every such witness.

In general, the experiences cited confirm the well-established fact that success in farming as in other lines, depends in great part on the individual. Some are able, through greater efficiency, larger command of capital, greater willingness to practice economies, etc., to cope with adverse forces more effectively than others. In some of the older wheat-producing areas diversification has brought better results than can be achieved when wheat has been emphasized. On the other hand, the extension of wheat production into new areas, especially in the Southwest, is attended by large risks owing to the variable climatic conditions. Wheat production here is highly speculative and is profitable, as an average of good and bad years proposition, only if land values have been or are kept within the limits set by average yields over a period of years. Throughout the entire western district climatic conditions appear to have been especially adverse during the post-war period. The older wheat regions of the Northwest and Pacific Northwest have particularly felt the effects of droughts. In the latter, summer fallowing and increased weeds, as shown by heavy dockage, have reduced the earning power of the land.

If it is possible to generalize on the basis of the individual experiences related on the record, it may be concluded that there has been general improvement in the western district as a whole over the conditions which immediately followed the collapse of grain prices. Where rapid expansion of wheat production has recently occurred or is now in process, there is evidence of belief in the profitableness of wheat. In the older regions conditions are somewhat less favorable, owing, among other things, to the financial burden which agriculture labors under and to the increasing competition of the newer wheat regions. A greater percentage of the farmers in the older regions probably are conducting their operations on a less satisfactory basis than before the war, though there has been distinct improvement over the worst conditions.

Tenants have been particularly troubled. Early losses, in some cases on livestock, reduced or wiped out their working capital and made it difficult for them to carry on satisfactorily or to any large extent acquire land even at prevailing prices.

Further phases of the return earned by agriculture are considered in connection with ensuing discussion of the changing purchasing power of the farmer's dollar.

PURCHASING POWER OF THE FARMER'S DOLLAR

The term "purchasing power" has been used in this proceeding with two distinct meanings. The first, emphasized by the shippers, represents a pure price comparison; the second, stressed by the carriers, brings in the number of dollars received as well as what a single dollar will buy. Each use of the term has merits for specific purposes, as well as limitations which must be clearly understood. The present section is devoted to purchasing power in the first sense.

Considerable difference of opinion developed as to the price series to be used in conjunction with agricultural prices. The carriers generally preferred

to use the wholesale prices of all commodities, while the shippers urged the use of either the wholesale prices of nonagricultural commodities or the new index of prices paid by the farmer prepared by the United States Department of Agriculture. The last commends itself as being closest to the facts in which we are interested and will be used in subsequent calculations. As finally offered for the record and as now generally available, this index does not embrace farm wages and taxes, but is limited to the retail prices of commodities purchased for living and production. The fact that it is available only on a national basis is perhaps a little more serious than would be the case if wholesale prices were used. This qualification must be held in mind when use is made of this index in conjunction with farm prices for individual States.

That the reader may, however, have before him all of the general indexes offered for the record, the following table is presented. It will be noted that the new index runs generally lower than either of the indexes of wholesale commodity prices. It therefore produces a higher purchasing power than the older indexes. The new index is, however, from 1 to 6 points higher than the all-commodities index for the years 1921, 1924, and 1926–1928. Strikingly divergent results are to be noted in the years 1917 and 1920.

Year	U. S. Department of Labor wholesale price index		U. S. Department of Agriculture		
	All commodities [1]	Nonagricultural commodities [1]	Prices paid by farmers for living and production [1]	Farm wages [1]	Taxes [1]
1910	103	102	98	97	----------
1911	95	96	101	97	----------
1912	101	100	100	101	----------
1913	102	105	100	104	----------
1914	100	97	101	101	100
1915	103	101	106	102	102
1916	129	138	123	112	104
1917	180	182	150	140	106
1918	198	188	178	176	118
1919	210	199	205	206	130
1920	230	241	206	239	155
1921	150	167	156	150	217
1922	152	168	152	146	232
1923	156	171	153	166	246
1924	152	162	154	166	249
1925	162	165	159	168	250
1926	154	161	156	171	253
1927	149	152	154	170	----------
1928:					
January	151	150	154	161	----------
February	151	151	154	----------	----------
March	150	151	155	----------	----------
April	152	151	156	166	----------
May	154	152	156	----------	----------
June	153	152	157	----------	----------
July	154	----------	156	170	----------
August	155	----------	156	----------	----------
September	157	----------	156	----------	----------

[1] 1910-1914=100. [1] 1914=100.

The purchasing power of grains as a group and that of all groups of farm products for the years 1915 to September, 1928, obtained by use of the aforementioned new index of prices the farmer pays at retail follow:

Year	Purchasing power of grains [1]	Purchasing power of all agricultural commodities [1]	Year	Purchasing power of grains [1]	Purchasing power of all agricultural commodities [1]
1915	113	94	1927	83	85
1916	102	95	1928:		
1917	145	117	January	81	89
1918	127	112	February	83	88
1919	113	102	March	81	88
1920	112	100	April	92	90
1921	72	74	May	103	95
1922	69	82	June	97	92
1923	75	86	July	91	93
1924	84	87	August	77	89
1925	96	92	September	75	90
1926	83	87			

[1] On 5-year base, August 1909, to July, 1914.

It will be observed that both grains and all farm products achieved their maximum purchasing power in 1917 and that grains enjoyed a considerably greater advance in purchasing power from 1915 to 1920 than did farm commodities generally, while since 1920 their purchasing power has generally been below that of all farm products.

The purchasing power of the individual grains may next be traced for representative States and for the United States. The indexes of prices received (except those shown for the United States and for the last three months in the table) are weighted by the monthly marketings. These indexes are available for the crop years, while the retail-price index which is to be used in conjunction with them is on a calendar-year basis. No objection lies, however, against combining these indexes, since the costs met in producing the 1926–27 crop, for example, were incurred largely in the calendar year 1926, when also the greater part of the grain would be marketed.

Purchasing power of wheat, crops of 1915 to 1927, and July to September, 1928

Year	United States	Kansas	Nebraska	North Dakota	South Dakota	Montana	Oregon	Washington
1915–16	105	107	105	160	112	102	102	109
1916–17	136	140	143	135	124	134	121	122
1917–18	155	165	163	152	152	165	166	169
1918–19	131	132	138	133	131	139	145	143
1919–20	121	123	123	131	127	145	126	120
1920–21	100	96	94	96	86	99	119	135
1921–22	76	77	75	73	75	81	76	76
1922–23	73	73	74	67	67	75	80	81
1923–24	69	69	68	68	64	75	73	77
1924–25	94	90	94	95	94	102	103	101
1925–26	104	106	109	97	96	114	106	111
1926–27	90	90	92	92	92	98	97	96
1927–28	90	94	92	83	86	85	96	97
1928:								
July 15	85	83	87	83	85	88	98	96
Aug. 15	70	64	68	65	66	67	80	84
Sept. 15	69	66	69	62	65	65	80	83

In the United States and each of the States, wheat attained its maximum purchasing power in the year 1917–18, declined thereafter to 1923–24, attained its greatest post-war purchasing power in 1925–26, and in September, 1928, had in the various States from about two-thirds to four-fifths of its normal purchasing power.

Oklahoma is not included in the above table because comparable basic data are not of record. The purchasing power of Oklahoma wheat in terms of

wholesale nonagricultural commodities is, however, given by months for a term of years. In 1928 the range of purchasing power was from 111 in January to 84 in September, after which there was a rise to 90 in May, 1927, the last month given. There has been improvement over the years 1922 to 1924, when for the most part the purchasing power ranged from 56 to 75.

Purchasing power of corn, crops of 1915 to 1927, and July to September, 1928

Year	United States	Iowa	Nebraska	Minnesota	South Dakota	Kansas
1915-16	102	112	98	120	104	93
1916-17	151	147	140	149	141	130
1917-18	153	174	172	173	168	162
1918-19	133	146	147	137	138	144
1919-20	115	128	125	131	129	123
1920-21	47	59	47	51	51	44
1921-22	54	47	41	50	42	42
1922-23	79	71	67	75	64	67
1923-24	85	85	73	82	75	74
1924-25	107	124	115	119	115	103
1925-26	69	77	74	79	83	72
1926-27	74	76	82	78	80	76
1927-28	86	101	86	99	87	76
1928:						
July 15	102	113	101	117	105	91
Aug. 15	97	106	94	108	99	83
Sept. 15	94	106	97	104	99	83

Corn also achieved its maximum purchasing power in each of the States shown and in the country as a whole in 1917–18, declining thereafter to 1921–22, then rising to its highest postwar purchasing power in 1924–25. In September, 1928, corn had in the various States from 83 to 106 per cent of its normal purchasing power. Corn has achieved a more complete recovery than the other grains.

Purchasing power of oats, crops of 1915 to 1927, and July to September, 1928

Year	United States	Iowa	Minnesota	South Dakota	Nebraska
1915-16	92	96	91	84	88
1916-17	104	107	105	98	97
1917-18	119	126	122	117	116
1918-19	98	101	97	94	99
1919-20	98	99	97	94	94
1920-21	62	62	60	60	64
1921-22	53	47	46	41	43
1922-23	64	62	57	53	58
1923-24	70	67	63	58	63
1924-25	78	82	79	76	78
1925-26	61	62	57	54	66
1926-27	66	67	65	66	74
1927-28	80	84	80	72	78
1928:					
July 15	89	97	93	82	85
Aug. 15	61	57	59	51	56
Sept. 15	58	59	57	51	60

The story is similar in the case of oats. A maximum was reached in 1917–18, then ensued a decline to 1921–22, with recovery to a postwar maximum, generally in 1927–28, of from 78 to 84 per cent of normal. In July, 1928, the purchasing power of oats stood at 89 in the country as a whole, but by September it had fallen to 58 per cent of normal.

Of the three grains, wheat and corn advanced and receded in about equal measure in the years 1915–16 to 1920. The purchasing power of oats advanced the least and was above 100 in only two years. In 1926–27 and 1927–28 wheat

led the other two grains in purchasing power, but in September, 1928, was considerably below corn and not greatly above oats in purchasing power.

Referring again, by way of summary, to the index relating to all the grains, it may be said that considerable improvement has been effected over the worst conditions. This improvement is measured by the advance in purchasing power from 69 in 1922 to 88 in 1927. In 1928, purchasing power rose from 81 in January to 103 in May, and then fell to 76 in September, when the influence of the new crops became fully felt. It is apparent that the farmer is still buying in a higher-priced market than he is selling in and that the grain farmer is at a disadvantage compared with agriculture in general. These comparisons do not embrace changes in wage rates or in taxes. The latter have shown a large and continuing increase. Changes in the debt burden also are not reckoned with.

The carriers urge, however, that pure-price comparisons are not altogether significant, that in the determination of the well being of the farmer, the number of dollars he receives and what each dollar of outlay procures in the way of useful goods and services are also important factors. A large crop, it is said, may compensate for a reduced price, as may increased efficiency of farm operations. No one has satisfactorily shown the weight to be given to changes in efficiency. The question of the effect of changes in the number of dollars received is considered in the section following. The further contentions, on the one hand, that the farmer does not charge city prices for the things of his own production which he consumes, and on the other hand, that the city dweller has relatively more dollars to spend than the farmer, do not permit of satisfactory answer without more exhaustive study than is possible on the basis of the present record. Furthermore, comparisons with city dwellers were generally made on the assumption of permanent employment at standard wages. Such factors as unemployment and living conditions in cities were ordinarily not stressed or ever mentioned; yet they are most important. It is difficult to see how comparisons between life on the farm and life in cities based almost solely on dollars can be very helpful for any purpose.

PURCHASING POWER OF AGRICULTURAL INCOME

Purchasing power in the second sense referred to above takes account of the number of dollars the farmer has to spend as well as of what each dollar will buy. More specifically, it is the cash income of the farmer after the payment of interest and taxes, expressed in terms of general prices. It shows, according to its sponsor, "the ability of the farmer to purchase industrial products at the present price level." However, that part of the cash income required in the payment of farm wages is, it may be noted, only indirectly available for the purchase of industrial products. The estimates of gross income, made from official sources, appear to be conservative, but some of the other estimates are drawn from unofficial sources. The price series used is that of nonagricultural commodities at wholesale. The use of this index is more satisfactory than would be the use of the all-commodity price index. Both income and prices are on a 1909–1913 base. The difference in results obtained by using this base rather than the more commonly used 1910–1914 base is not material.

The index of purchasing power of "available cash income" was placed in the record for all farm products, by States, for the years 1909–10 to 1927–28. The only individual product for which the index is given is wheat, and in this case there is no deduction for interest and taxes paid.

So much is said elsewhere in this report about agriculture as a whole that extended discussion along that line is not justified. The index of purchasing

power of average cash income per farm for the entire United States is, however given below.

Purchasing power per farm of available cash income

Year	Purchasing power	Year	Purchasing power
1909-10	98	1919-20	107
1910-11	101	1920-21	87
1911-12	98	1921-22	71
1912-13	98	1922-23	84
1913-14	102	1923-24	96
1914-15	103	1924-25	106
1915-16	97	1925-26	109
1916-17	95	1926-27	106
1917-18	123	1927-28	113
1918-19	126		

All farms, of whatever description, are represented in the above results. Such an average farm had in 1927–28, 13 per cent more dollars' purchasing power than it had in the base period 1909–13, after paying an increased interest burden and a very considerably greater tax burden. But differences in costs are reckoned with only in so far as the index of nonagricultural prices may be said to reflect them. While this index generally runs higher than the new combined index of prices paid by the farmer for commodities used in living and production, the difference between them has been declining in recent years, until in 1927 and 1928 the new index became slightly higher than the nonagricultural price index. Changes in farm wages are not reflected in the table here given. Wages stood in 1927 and in July, 1928, at a point 70 per cent above 1910–14, or appreciably higher than nonagricultural prices.

Wheat income, without deduction of interest and taxes, is given both in the aggregate and on an acre basis. The following table gives the aggregate purchasing power of wheat for the States in which, on the average of the years 1921–25, wheat represented 10 per cent or more of the farm sales.

Index of aggregate purchasing power of wheat income (1909–13=100)

Year	Kans.	Okla.	Nebr.	N. Dak.	S. Dak.	Mont.	Idaho	Colo.	Oreg.	Wash.	U. S.
1909-10	117	97	110	183	138	56	98	88	86	105	114
1910-11	87	156	90	35	138	70	84	101	105	76	101
1911-12	75	83	95	88	31	100	120	96	99	104	98
1912-13	100	102	99	144	117	139	106	111	121	102	96
1913-14	111	92	115	78	78	144	95	102	90	118	101
1914-15	204	204	173	111	91	168	136	133	130	117	155
1915-16	133	267	139	169	161	204	145	132	115	105	140
1916-17	170	223	192	44	71	277	153	156	146	96	114
1917-18	73	205	27	79	169	171	171	196	98	86	124
1918-19	164	338	108	156	215	285	216	193	111	76	130
1919-20	227	436	146	81	97	54	202	210	141	104	148
1920-21	224	356	151	87	66	234	251	89	178	119	119
1921-22	133	206	96	69	49	198	155	163	121	99	94
1922-23	109	115	84	94	69	276	120	143	81	47	84
1923-24	93	144	90	51	45	229	164	111	116	91	75
1924-25	206	289	115	153	85	400	128	181	77	51	117
1925-26	163	169	74	122	87	291	208	156	125	96	102
1926-27	191	467	76	51	21	233	195	161	113	83	106
1927-28			149	138	115	353	248	206	161	116	115

The most striking feature of this table is the highly erratic character of the index. To cite a single example, wheat income in South Dakota had a purchasing power of 87 in 1925–26, of 21 in 1926–27, and of 115 in 1927–28. Differences result from variations in yield, in price, or in acreage. The witness who testified on this subject stressed, however, the trends. These can be

observed most clearly in the last column, that for the United States as a whole. In 1918–19 the purchasing power of wheat income reached its maximum po nt, 159, after which it declined to 75 in 1923–24, recovering to 117 in 1924–25 and being 113 in 1927–28. Changes in acreage in this period obscure the picture, however, and so a second table, showing purchasing power per acre of wheat income, is given.

Index of purchasing power per acre of wheat income (1909–1913=100)

Crop year	Kans.	Okla.	Nebr.	N. Dak.	S. Dak.	Mont.	Idaho	Colo.	Oreg.	Wash.	U.S.
1909–10	109	119	122	152	153	111	112	106	87	110	121
1910–11	108	143	98	37	134	103	85	105	113	89	104
1911–12	88	67	90	78	30	119	112	91	96	103	98
1912–13	102	94	92	147	113	83	100	102	110	99	96
1913–14	92	76	97	84	70	85	90	93	92	108	94
1914–15	191	174	138	124	92	92	120	117	126	145	126
1915–16	87	89	105	155	153	98	104	97	98	116	109
1916–17	116	106	159	50	69	96	117	109	132	124	102
1917–18	106	123	78	92	176	51	109	136	83	108	120
1918–19	126	122	83	163	232	62	110	64	82	76	139
1919–20	109	130	98	73	89	8	86	66	100	92	92
1920–21	135	153	123	88	76	43	110	18	128	107	93
1921–22	71	78	70	59	61	38	67	39	86	86	71
1922–23	61	80	59	85	84	39	55	37	87	42	68
1923–24	46	60	37	43	55	41	76	33	81	82	59
1924–25	116	121	110	145	130	67	75	56	66	60	104
1925–26	70	69	82	112	115	46	124	56	99	102	91
1926–27	105	120	73	69	39	48	86	46	83	88	90
1927–28	(1)	(1)	120	106	129	78	102	58	117	117	99

[1] Not available.

The same pronounced variation of results is found in this table that was noticeable in the proceding one. The extreme case is that of Montana, the purchasing power of whose wheat income in 1919–20 was 8 compared with 62 in the year preceding and 43 in the year following. The general trend is quite different from that for total wheat income. The peak year here is generally 1914–15 instead of 1918–19, the rise is to only 136 instead of 159, and the present position is 90 instead of 113. Improvement is indicated over the lowest year, 1923–24, when the index stood at about three-fifths of normal, to a more or less stable purchasing power in 1926–28 of about 90 per cent of normal. Considerable variations from these general trends occur in the individual States. Of the States shown, only Montana and Colorado in 1927–28 had acre purchasing power below 100. Other States of record which help to brink down the United States average are Illinois 88, Iowa 95, Minnesota 63, Wyoming 62, Utah 84, Arizona 72, Nevada 81, and California 97.

Changes in operating costs, especially over longer periods, are inadequately reflexted in this index, and deduction is not made for interest and taxes, which have increased so greatly in the war and postwar period. Takes on farm land and buildings were in fact 138, 261, and 269 per cent greater in 1926 than in 1913 in the west north-central, mountain, and Pacific groups of States, re spectively. The increase in farm wages has already been noted. It also is true that some of the costs increase as yield per acre increases, such being costs of harvesting, twine, and transportation to elevator. These qualifications must be kept in mind.[4]

A trend of purchasing power of the individual agricultural worker for the years 1866 to 1927 was also put in the record. This, standing at 131 in 1927, is said to reflect the decrease in the number of persons engaged in agriculture and the increased output per person. A chief objection to such an index is its failure to give weight to the fact that the increased output per person is the

result in large part of the increased use of machinery. Without reckoning with the farmer's investment in labor-saving appliances, this index is not particularly helpful.

VALUE OF LAND AND OTHER FARM CAPITAL; LAND SALES

The value of land and its appurtenances, which constitutes so large a part of the value of all farm property, may be regarded as perhaps the most fundamental of the secondary evidences of the condition of agriculture. Land values reflect changes in the net income derivable from the use of lands as well as changes in the prevailing interest or "discount" rates. Net income in turn reflects changes in farm expenses and taxes as well as in physical yield of the land and what this yield can be sold for. For reasons indicated presently, land values do not, however, respond quickly to changes in these governing factors. Thus they did not decline so precipitously as did prices in and after 1920 and they continued to decline after recovery had set in in agriculture income.

In two essentials the record is incomplete on the subject of land values. The values furnished are for the most part those of agricultural lands generally, including those devoted to livestock and other production as well as to grain raising. The record also fails to reveal satisfactorily how much of the rise and subsequent decline of land values was merely nominal. An adequate answer to this question would require information as to the percentage of farm lands that changed hands in the period of rising land prices.

The general sources of information as to land values are the estimates of the census and those of the United States Department of Agriculture. Statistics from the latter source are chosen for use here because, among various reasons, they are available by yearly intervals and can be had for later years than can those of the census. Allowance must be made, however, for the fact that the department's figures begin with 1912 and, in index form, are based on the average values of the years 1912–1913–1914, years during which land values were rising.

The course of land values in representative States and in the entire United States is shown in the following table:

Farm real estate, index of estimated value per acre 1912–1928

[1912-1913-1914=100]

Year [1]	United States	Minnesota	Iowa	Missouri	North Dakota	South Dakota	Nebraska	Kansas	Oklahoma	Texas	Montana	Idaho	Washington	Oregon
1912	97	95	96	97	97	96	98	101	98	95	97	100	98	97
1913	100	100	99	100	100	101	100	99	101	100	100	101	100	100
1914	103	105	104	103	103	103	102	99	101	105	103	99	103	103
1915	103	107	113	103	103	101	101	102	96	108	100	96	100	99
1916	108	122	128	108	112	108	104	100	104	103	94	99	102	100
1917	117	138	154	115	118	116	110	115	114	115	100	114	113	104
1918	129	155	145	126	124	126	127	122	130	133	106	130	118	113
1919	140	167	160	137	130	145	145	132	140	141	114	146	122	118
1920	170	213	213	167	145	181	179	151	166	174	126	172	140	130
1921	157	212	197	156	141	173	166	140	160	156	105	162	132	130
1922	139	187	162	133	126	146	144	130	139	133	98	156	124	122
1923	135	177	156	127	128	126	139	127	133	128	87	133	117	115
1924	130	170	143	117	114	117	128	118	128	127	81	129	115	113
1925	127	169	136	113	109	115	123	115	131	146	78	128	113	110
1926	124	165	130	104	105	107	119	113	126	141	72	119	112	107
1927	119	145	121	99	99	97	117	113	127	130	70	117	111	106
1928	117	140	117	96	99	96					71	116	110	106

[1] All farm land, with improvements, as of Mar. 1.

To understand the decline which has occurred and the present level of land values it is necessary first to note the preceding increase. It will be seen at a glance how large an increase in land values was concentrated in a period of a few years. From March 1, 1912, to March 1, 1917, five years, the index of values in the United States advanced from 97 to 117, or slightly over 20 per cent; from March 1, 1917, to March 1, 1920, three years, it advanced from 117 to 170, an additional 45 per cent. In every State, 1920 was the peak year. The percentage increase from the base period to 1920 varied, however, within rather wide limits, being greatest in Minnesota and Iowa, each 113 per cent, and in South Dakota, Nebraska, Texas, and Idaho, where the increase ranged from 81 down to 72 per cent. In Missouri, Oklahoma, Kansas, North Dakota, Washington, Oregon, and Montana the increase was less than 70 per cent, the average for the country. The largest increases were registered, it will be noted, in States in which a varied crop and livestock agriculture is carried on rather than in the States specializing in cash grain production.

What, next, of the decline of land values since 1920? This is shown in the following table, together with the percentage increases from pre-war to 1920 and 1928, respectively:

State	Per cent decrease in value per acre, 1920 to 1928 (1912–1914=100)	Per cent increase in value per acre over 1912–1914	
		1920	1928 [1]
Minnesota	34	113	40
Iowa	45	113	17
South Dakota	47	81	*4*
Nebraska	35	70	17
Texas	20	74	39
Idaho	33	72	16
Missouri	43	67	*4*
Oklahoma	23	66	27
Kansas	25	51	12
North Dakota	32	45	*1*
Washington	21	40	10
Oregon	18	30	6
Montana	44	26	*89*
United States	31	70	17

[1] Decreases in italic.

As would be expected, the decline in land values from 1920 to 1928 was generally greatest where the increase had been the largest in the preceding period. Montana, however, shows nearly the maximum percentage decline though it had experienced the smallest increase from the base period to 1920. This serves to illustrate the point that changes in acre value reflect in part changes in the uses to which lands are put. Thus in the case of Montana, nonirrigated tillable lands declined in acreage from 32 to 19 millions from 1921 to 1927, and grazing lands increased from 18 to 29 millions. The value of these tillable lands, according to State authorities, declined in this period only $1.58 per acre or 10.7 per cent, while that of grazing lands fell $2.24 or 32.3 per cent. The large reversion of crop lands to pasturage had a steadying influence on the value of the remaining crop lands but a depressing effect on the value of pasturage lands and of all lands. In the case of Oregon, on the other hand, land formerly devoted to wheat production is being used more intensively for fruit

raising and its value has risen. This fact of changes in the use made of land is of importance in any interpretation of changes in land values.

It will next be noted in the preceding table that in the United States as a whole values in 1928 were 17 per cent above those of 1912–1914. In Minnesota and Texas, however, they were some 40 per cent above and in Montana 29 per cent below. Of the remaining 10 States, 8 show values less by 1 to 4 per cent than those of the base period. Attention is again called to the base used in these comparisons. The census values put in the record show a 35 per cent net increase in 1910 to 1925 in the value per acre of lands and buildings. The increase shown in the table presented earlier was 27 per cent from the average of the years 1912–1914 to 1925. Before attaching particular significance to these percentage increases, consideration must be given to the approximately 50 per cent net increase in the general price level since 1912–1914.

Both shippers and carriers presented evidence on this subject. The results obtained depend in considerable part on the price series used for converting values expressed in current dollars into values expressed in pre-war dollars. The carriers used 1910 wholesale prices in connection with census land values, while others used the same price series on a 1910–1914 base or the new index of what farmers pay for commodities at retail and in wages and taxes. It has seemed best, for the purpose in hand, to use the wholesale commodity price index on a 1913 base. In the following table the index of land values previously given is reduced to dollars of constant purchasing power by dividing by the index of wholesale prices on a 1913 base. The table can not be extended beyond 1927.

Farm real estate, index of estimated value per acre (1912–14=100) in terms of 1913 wholesale commodity prices

[Previous index of land values on 1912–1914 base divided by United States Bureau of Labor statistics index of wholesale commodity prices on 1913 base]

Year	United States	Minnesota	Iowa	Missouri	North Dakota	South Dakota	Nebraska	Kansas	Oklahoma	Texas	Montana	Idaho	Washington	Oregon
1912	98	98	97	98	98	97	99	102	99	96	98	101	99	98
1913	100	100	99	100	100	101	100	99	101	100	100	101	100	100
1914	105	107	106	105	105	105	104	101	103	107	105	101	105	105
1915	102	108	111	101	102	100	100	102	94	102	99	95	99	98
1916	85	96	101	85	88	85	83	86	82	81	74	78	80	79
1917	68	78	76	65	67	66	62	65	64	65	56	64	63	59
1918	66	80	75	64	64	65	65	63	67	69	55	67	61	58
1919	66	81	78	67	68	70	70	64	68	68	55	71	60	57
1920	75	94	94	74	84	80	79	67	73	77	66	76	63	58
1921	107	144	134	106	96	115	113	101	109	106	71	110	90	88
1922	98	128	109	89	91	98	97	87	98	89	64	91	83	82
1923	88	115	101	83	83	83	90	82	86	83	56	86	76	75
1924	87	113	96	78	76	78	85	79	83	91	54	86	77	75
1925	80	100	86	70	69	72	77	72	82	82	47	77	71	69
1926	83	103	88	69	70	71	81	78	86	97	48	79	74	71
1927	81	99	83	67	68	66	81	77	87	96	48	80	76	72

The contrasts between this and the second preceding table are marked. Only in Minnesota and Iowa and, to a less extent in South Dakota and Nebraska, did considerable increases in the "purchasing power" of lands occur. Land values also distinctly lagged behind prices in general as seen in the fact that in 6 of the 13 States the peak year came before the war, most

commonly in 1914. This was generally the year of the secondary peak for the other 7 States, whose main peak came in 1921, after prices had broken. In 1920 in the United States as a whole lands had only three-fourths of the value, expressed in 1913 dollars, that lands in 1912–14 had.

Since 1921 there has been a net loss of nearly a fourth in purchasing power, with the result that the purchasing power of lands per acre in 1927 was 19 per cent below that of 1912–14. The range, among the States shown, in the decline from 1912–14 to 1927 is from 1 per cent in the case of Minnesota to 52 per cent in the case of Montana, with the remainder ranging from 34 down to 4 per cent. A quite general improvement occurred in 1926, but this was due to a drop in the commodity-price level and not to an increase of land values. This improvement was not held in the year following, though in both years the percentage change was small. There has been, in fact, a considerable degree of stability of land values shown in the last two years.

The significance of all foregoing is principally in what is reveals as to the present compared with the pre-war earning power of agriculture. Despite a well-maintained volume of physical production, the chief earning assets of agriculture command prices only slightly more than a sixth higher than they did in 1912–14, while in relation to the prices of commodities bought and sold every day they command a price a fifth lower than they did in 1912–14. Though, owing to the pressure of forced sales and to the presence of distress lands, values have responded more slowly than they otherwise would to changes in the governing situation, it is reasonable to conclude that the present level of land values reflects an earning power below that of 1912–14. The actual drop of values, running over 16 billions of dollars in the entire United States from 1920 to 1925, is of less general significance, except for those who incurred obligations at high prices to be discharged in a period of lower prices. To these we turn in the succeeding section. A word may be said, however, about the volume of land sales.

The volume of sales became very small after the collapse of land values. The market was held down not only by the general outlook for agriculture but by the specific factors named above (forced sales and distress lands). A considerable reduction (some 31,000,000 acres) of farm acreage also occurred between 1920 and 1925. Tenants likewise were not in position to acquire lands, and the general fact that values were falling made buyers cautious.

There is indication, however, of some picking up in voluntary sales in the years 1927 and 1928, in scattered communities. Temporary improvements of crop conditions sometimes stimulated demand. Buyers were in large part local farmers extending their holdings while prices were down; to a less extent they were tenants; and to some extent they were residents of towns and cities acquiring farm lands for investment or speculative purposes. Excepting Kansas and Oregon, where prices for the last two or three years have been fairly stable, these purchases were made on a market still declining, though moderately, particularly in Oklahoma, Montana, Idaho, and Washington. There is reason to believe that land values will shortly be in a position to reflect more clearly such improvement as has occurred in farm earnings.

FARM INDEBTEDNESS

The evidence as to farm indebtedness will be examined first under the head of real-estate mortgage indebtedness and then under that of chattel-mortgage and other indebtedness.

Under normal conditions agricultural property carries a considerable amount of real-estate mortgage indebtedness, incurred in the purchase of lands, in making improvements, and for numerous other reasons. Thus in 1910 there was mortgage indebtedness on owner-operated farms alone of 1.7 billions. In Minnesota in that year 46.0 per cent of the owner-operated farms were mortgaged and to 26.4 per cent of their value; in Montana, 20.6 per cent of the farms to 24.1 per cent of their value. The increase in this indebtedness to 4 billions in 1920 and 4.5 billions in 1925 is pointed to as evidence of adverse conditions experienced by agriculture. In the following table this increase is set forth for a number of States for the census years. Annual data are available in only a very limited way.

Mortgage debt on owner-operated farms

State	1910	1920	1925
Minnesota	$377,866,000	$254,475,000	$267,027,000
Iowa	204,243,000	498,817,000	625,629,000
North Dakota	47,842,000	105,285,000	82,411,000
South Dakota	52,771,000	89,875,000	100,306,000
Nebraska	62,373,000	168,509,000	216,256,000
Kansas	70,320,000	109,914,000	130,231,000
Montana	10,741,000	77,950,000	42,565,000
Idaho	14,557,000	69,868,000	54,912,000
Washington	25,645,000	61,121,000	74,212,000
Oregon	21,166,000	51,999,000	65,392,000
United States	1,726,173,000	4,003,767,000	4,517,259,000

In the United States as a whole, mortgage indebtedness increased 131.9 per cent from 1910 to 1920 and 12.8 per cent from 1920 to 1925; in the 10 States shown above the increases were 160.9 and 12.0 per cent, respectively. For the 1910–1920 period more detailed information is of record for only four States, as follows:

State	Percentage of owner-operated farms mortgaged [1]			Ratio of mortgage indebtedness to value [2]			Per cent increase of indebtedness	
	1910	1920	1925	1910	1920	1925	1910–1920	1920–1925
Minnesota	46.0	52.4	48.6	26.4	27.5	43.6	226.8	4.9
South Dakota	37.4	57.0	62.4	21.2	21.8	42.7	174.3	11.6
Montana	20.6	50.5	54.6	24.1	32.4	44.7	625.8	[3] 48.4
Oklahoma	43.5	61.4	48.3	22.4	26.9	39.7		

[1] All owner-operated farms. [2] Only farms operated by full owners. [3] Decrease.

It will be seen that from 1910 to 1920 the percentage of owner-operated farms mortgaged increased very materially in three of the States and noticeably in Minnesota. On the other hand, the ratio of mortgage indebtedness to value of land and buildings was practically constant in this period in Minnesota and South Dakota, increased moderately in Oklahoma, and materially in Montana alone. The fact that more farms were mortgaged in 1920 than in 1910 may indicate either the purchase of farms previously without mortgages by persons unable to pay cash in full, or the placing of mortgages on farms without change of ownership. Both processes were at work in proportions which it is difficult to state definitely. The evidence as to land sales, land values, and the exten-

sion and profitableness of operations seems to indicate that the turnover of lands contributed in this period more largely than any other factor to the increase of mortgage indebtedness. In Montana, however, where, as previously indicated, land values increased the least of any State in the period from 1912–1914 to 1920, the increase in percentage of farms mortgaged and in the ratio of debt to value reflects in large part the vicissitudes of homesteading operations. The number of owner-operated farms in this State increased from approximately 21,500 in 1910 to 38,500 in 1920. The expansion of farming operations generally throughout the western district, to the extent of 92,000,000 acres, or 16 per cent, from 1910 to 1920, would, in fact, furnish the basis for a considerable expansion of mortgage indebtedness.

Factors probably secondary in importance in accounting for the increase of mortgage indebtedness from 1910 to 1920 are the purchase of power and other machinery, to some extent because of the scarcity of labor, the making of improvements, and, probably in a limited degree, the funding of loans made because of temporarily adverse crop, livestock, or other conditions.

In the period from 1920 to 1925 the aggregate indebtedness on owner-operated farms increased 12.8 per cent in the United States and 12 per cent in the above western States. In contrast to the situation existing in the earlier period, when increases occurred in every State, three of the States show decreases in mortgage indebtedness (Montana 45.4 per cent, North Dakota 23.9 per cent, and Idaho 21.4 per cent). The increases in the other seven States range from 11 to 49 per cent. The largest increases are in Minnesota, Iowa, Nebraska, and Oregon.

The percentage of owner-operated farms mortgaged and the ratio of debt to value in 11 western States, 1920 and 1925, are as follows:

State	Percentage of owner-operated farms mortgaged [1]		Ratio of mortgaged indebtedness to value [1]		Ratio, 1925 indebtedness to 1920 value
	1920	1925	1920	1925	
Minnesota	51.0	46.2	27.5	43.6	28.6
Iowa	52.9	53.7	37.0	49.2	34.5
North Dakota	66.4	59.2	28.5	41.1	21.4
South Dakota	51.5	54.5	31.8	42.7	24.3
Nebraska	47.4	52.0	23.9	42.2	30.6
Kansas	41.0	41.0	25.9	39.1	30.7
Oklahoma	48.8	45.0	26.9	39.7	26.8
Montana	55.3	49.3	32.4	44.7	17.7
Idaho	56.6	52.1	31.2	45.0	24.8
Washington	43.5	43.8	30.3	37.2	36.7
Oregon	43.1	44.1	31.2	37.7	39.3
United States	30.4	34.1	29.1	41.9	32.8

[1] Only farms operated by full owners

The statistics given are not entirely satisfactory, owing to the fact that a substantial part of the full owners make no report on their indebtedness. Whether the ratios given above would be materially altered if all reported can not be determined.

In 5 of the 11 States (Minnesota, North Dakota, Oklahoma, Montana, and Idaho) the percentage of owner-operated farms mortgaged declined from 1920 to 1925; in Iowa, Kansas, Washington, and Oregon it remained practically constant; and in Nebraska it increased moderately. The ratio of debt to value of lands and buildings, on the other hand, increased in every one of the States

and in most cases materially. A larger proportion of the farms were free of mortgage indebtedness but the farms mortgaged were carrying heavier mortgages in relation to value than in 1920. In large measure the increase in the debt-value ratio resulted from declining land values. The index of farm real estate values for the entire United States fell from 170 in 1920 to 127 in 1925. However, as indicated in the last column of the table, had property values been the same in 1925 as they were in 1920, the ratio of debt to value in 1925 would have exceeded the 1920 ratio, except in North Dakota, Montana, and Idaho.

In accounting for the later increases reference must be made to the fact, well established on the record, that after the break of farm prices, in 1920, grain farmers as well as livestock men and others, found it necessary to borrow at their banks or elsewhere in what by normal standards would be considered excessive amounts. Farming losses, including heavy losses on inventory, necessitated borrowing to meet current obligations, taxes, and interest. The banks, themselves affected by the condition of their customers and by the decline of land values, soon found it necessary to secure themselves by requiring that the debts owing them be funded into mortgage indebtedness. In this sense a large part of the increased indebtedness of the 1920–1925 period represented a conversion of debts which had originally taken another form.

The decreases in aggregate mortgage indebtedness in this 5-year period, on the other hand, which in some States outweighed the increases, represent more generally defaults of one character or another rather than the outright liquidation of indebtedness. As detailed in a succeeding section, foreclosures and bankruptcies among farmers occurred on an enlarged scale. In some cases, the result was the outright abandonment of operations, particularly on the less advantageous or marginal lands; in other cases, foreclosed lands passed into the hands of creditors, causing the wiping out of the old mortgages and the placing of new ones, if any, on a much lower scale of values. Instances were cited in which farmers had reduced their indebtedness out of earnings, but retirements accomplished in this way appear to have been considerably less than those which were accompanied by the loss of ownership.

Summarizing the 1910–1925 period, it may be said that the net increase of mortgage indebtedness was due primarily to the purchase of high-priced lands and the indirect funding of operating losses. Secondary factors were the purchase of power machinery and the extension of farming operations generally. The situation in 1920 was precarious in that it required the maintenance of the high level of land prices then prevailing. The decline of land values rendered valueless a large part of the obligations given in the purchase of land. In 1925 much indebtedness remainded, representing obligations which had then been carried for a number of years. This hang-over of debts, to which livestock and other operations contributed as well as grain production, constitutes a factor of importance in judging the condition of agriculture to-day. There has been improvement since 1925, though on this point the record is far from satisfactory. Interest on mortgage and other indebtedness declined from 840 millions in 1921–22 to 758 millions in the years 1924–25 and 1925–26, with a subsequent decline to 750 millions in 1926–27. In places good crops in one or more years have made possible a considerable reduction of indebtedness, as in 1927 in the Pacific Northwest. The presence of newer types of credit agencies also serves to help ease the situation. The Federal land banks loan money for long periods of time on favorable terms. Debtors may amortize their debt, principal and interest, by making periodic payments through the life of their obligation. This appears to have a tendency to

continue mortgage indebtedness, leaving more of the farmers' capital free for other uses, comparable with what has long been established practice in manufacturing enterprises. Facts like these must be kept in view in a consideration of mortgage indebtedness on farms. But the real-estate mortgage indebtedness remains at a higher than normal level and its reduction remains a problem for agriculture.

Chattel and other similar indebtedness can be discussed rather briefly. The placing of chattel mortgages (except where these are placed on articles, such as automobiles, commonly purchased on a deferred-payment basis) is a distinct indication of a lack of credit. Tenant farmers ordinarily require greater use of them than owner operators. There are no satisfactory statistics of record from which it is possible to generalize as to the extent of chattel mortgages at different times in the period under review. The evidence is convincing, however, that a very considerable increase occurred in the period after 1920, and it appears that chattels were mortgaged which previously had not been considered suitable for such purposes. Testimony as to chattel mortgages was most extensive in the case of Kansas, where the problems of the tenant farmer were generally stressed more than they were in other parts of the investigation. There was little evidence as to foreclosures of chattel mortgages, though some as to the difficulty of collecting them. There was indication of some improvement in conditions in the Northwest and Pacific Northwest, but how extensive it has been can not be said.

Crop mortgages also came into more extensive use. While tenants are more often required to give such mortgages to secure the owner, the owner operator himself resorted to this means of carrying on his operations.

Seed-wheat pools and State seed or feed loans have also been resorted to. Seed pools are not, of course, a new thing at all. Crop failures due to climatic conditions appear to be the chief reason for them. Their use in the period since 1920 is indicative of both unusually severe crop conditions in particular years and of depleted credit. In some places State aid has been provided, for farmers unable to finance the carrying on of operations, and tenants have been assisted by landowners to keep them on the land.

In the succeeding section the foreclosures and bankruptcies among farmers, previously referred to, will be more fully accounted for and described.

FARM BANKRUPTCIES AND FORECLOSURES OF FARM PROPERTIES

The large growth of farm indebtedness, analyzed in the preceding section, necessarily entailed a greatly augmented interest burden. An increase in both the amount and the proportion of delinquent interest would be expected under these conditions and such there has been. A single example is that cited by the president of the Federal land bank at Wichita, the territory of which embraces Kansas, Oklahoma, Colorado, and New Mexico. Delinquent interest at this bank amounted in 1927 to $474,056 on loans aggregating 98 millions, as compared with $12,722 in 1918 on loans of a little over 16 millions. The farmers served by the bank were not, of course, exclusively engaged in grain production. Generally speaking, interest became delinquent when, on top of a number of years of poor earnings, one or more years of poor crops occurred.

The following statistics of interest and tax delinquencies, not collected on a uniform basis, revealed the general situation in some of the northern and western States.

Year	Delinquent rural real-estate taxes, Wisconsin	Accumulated delinquent taxes, Montana	Interest delinquent on Montana State farm loans	Delinquent taxes, two Washington counties [1]
1918	(2)	$4,955,000		
1919	$820,317	6,491,000		
1920	1,455,307	9,572,000		$114,420
1921	2,360,441	(2)	$157,340	187,053
1922	2,346,435	12,280,000	282,574	300,671
1923	2,470,112	12,524,000	414,512	253,799
1924	2,504,220	15,042,000	630,264	289,944
1925	2,298,356	14,054,000	780,000	443,683
1926	2,499,173	13,830,000	354,975	(2)

[1] Walla Walla and Columbia Counties.
[2] Not given.

In interpreting these figures, allowance must be made for the time which elapses between the occurrence of the conditions which lead to delinquency and that at which the interest or taxes are recognized as delinquent. Taxes are sometimes allowed to remain unpaid while it is being determined whether it is advantageous to pay them rather than lose the property. Both interest and taxes may be delinquent on lands which have become abandoned; on the other hand, a reduction in the amount delinquent may be the result of a change of ownership, the new owner taking the back payments out of the price he pays and meeting future payments. A reduction may also result from borrowing to meet interest and taxes. Much of such borrowing did in fact occur.

With all these qualifications, it is difficult to interpret the figures given above. They show, however, large increases in the aggregate of delinquencies and little change for the better in the years covered. The apparent exception in the case of delinquent interest on Montana State farm loans is accounted for in large measure by the reduction of 37 per cent in the volume of farm loans from 1925 to 1926. The situation in Washington needs explanation. In Walla Walla County said to be the leading wheat county of the State, 5 per cent of the tax roll was delinquent in 1920 and 28 per cent in 1926; in Columbia Country, on the other hand, delinquencies declined from 10 per cent in 1920 to 4 per cent in 1926. In two other counties south of the Snake River, Asotin and Garfield, delinquent interest in 1925 and 1926 averaged about 23 per cent of the tax roll. Tax sales in North Dakota were extensive from 1923 to 1926, the year of record. On December 31, 1927, tax delinquencies on the books of the Federal land bank at Spokane amounted to $1,613,605, a considerable sum.

However, the evidence, particularly that relating to the Pacific Northwest, taken toward the close of the hearings, points to some improvement in the situation, as shown by the fact that current interest and tax payments were being met more promptly in 1927 and 1928 and that some success was being had in catching up on delinquencies. Such was the testimony, for example, as to the State of Washington generally and as to Walla Walla and Whitman Counties, and as to Gilliam and Wheeler Counties, Oreg. How extensive the improvement has been was not established.

In turning next to the record of farm foreclosures and bankruptcies, it is to be borne in mind that increasing indebtedness rising and falling [illegible] values, poor farming returns, deliquent interest and taxes, and foreclosure[illegible] ank-ruptcies are all parts of one picture. The evidence is, therefore, to [illegible] tent cumulative.

A convenient summary of the many statistics put in the record as to farm foreclosures, bankruptcies, and other losses of farm properties is provided by

an exhibit of the representative c2 the United States Department of Agriculture. In abridged form, this exhibit follows:

State and division	Percentage of farmers who lost farms		
	Average January, 1920–March, 1923 [1]	Year ending March, 1926 [2]	Year ending March, 1927 [2]
East north central	1.75	1.80	1.68
Minnesota	2.50	2.68	2.47
Iowa	2.81	3.09	2.73
Missouri	2.34	2.14	2.17
North Dakota	4.79	4.63	4.90
South Dakota	3.86	5.25	5.11
Nebraska	2.84	2.19	2.53
Kansas	1.79	1.86	1.80
West north central	2.73	2.86	2.63
Montana	8.55	6.06	5.80
Wyoming	3.49	2.79	2.86
Colorado	4.47	4.33	3.63
Mountain	6.22	4.83	4.29

[1] Includes farms lost through and without foreclosure and bankruptcy, based on survey covering 60,000 owner farmers.

[2] Includes farms lost through foreclosure of mortgage, bankruptcy, default of contract, and sales, surrender, or other transfer of title to avoid foreclosure.

This exhibit is not complete in every particular. Pre-war figures are not given; a considerable part of the territory embraced in this proceeding is omitted; 1924, 1925, and 1928 figures are lacking; tenants' losses are not included; and separation of losses resulting from livestock and other operations from those on grain production is not possible. The establishment of trends is rendered difficult by the difference in method of computation of losses in the earlier and the later period and by the absence of data for 1924 and 1925.

However, the great extent to which farms were lost in the period since 1920 is at once apparent. The period from January, 1920, to March, 1923, is one of 3⅛ years. If the average number of losses in this period is multiplied by 3⅛ and to the result are added the losses shown for 1926 and 1927, it will be found that in the east north-central division, introduced for purposes of comparison, 8.81 farmers out of each 100 lost their farms in the period of a little over five years; that in the west north-central division 13.93 of every 100 lost their farms; and in the entire mountain group of States, 28.82 of every 100. It is likely that if data were available for 1924 and 1925 over a sixth of the farms in the west north-central division would be found to have been lost in the 1920–1927 period and at least a third of the farms in the mountain States. As indicated above, these figures do not relate solely to grain production.

For reasons hitherto stated, it is difficult to determine definitely whether or not there has been a trend toward improvement in delinquencies in recent years. The evidence provided in the table above is not clear cut except in the case of the mountain States, where, after heavy losses, a considerable reduction is to be seen in the later years. From annual data of record relating to certain States or counties there appears, however, to have been some improvement. Thus in Oklahoma the peak in farm foreclosures came in 1924; in Bourbon County, Kansas, apparently in 1925; in farm bankruptcies in 24 South Dakota counties in 1925; in North Dakota farm bankruptcies in 1924; in foreclosures

in the region covered by the Spokane Federal land bank (Washington, Oregon, Idaho, and Montana) in 1926. In Montana, however, the peak of foreclosures by this bank occurred in 1927, the last year of record. Allowance must be made, moreover, for the lag which characterizes foreclosure and bankruptcy proceedings. In some cases officials expressed the view that the foreclosures should have come sooner than they did. Allowance must also be made for the fact that, to be indicative of recovery, the drop from the peak must be at an accelerated rate, since each foreclosure or bankruptcy reduces the number of properties subject to such action.

Much was said about farm bankruptcies, one of the forms which farm failures, including those of tenants, take. As a matter of fact, the actual number of bankruptcies was not great. In 1925, the peak year of record for the country as a whole, there were only 1.24 bankruptcies per 1,000 farmers. The significance of the bankruptcy figures lies principally in what they show as to trends. The percentage increase was very great. Thus, to take an extreme case, there were 0.34 bankruptcies per 1,000 farms in Montana in 1910, 11.75 in 1924, and 13.80 in 1926. In Iowa, the increase was from 0.89 in 1910 to 4.08 in 1925, the peak year. Bankruptcies ranged much higher in the north and west than in the United States as a whole, for the range in the latter case was only from 0.13 in 1910 to the peak of 1.24 in 1925. Barring Montana, where bankruptcies were high from 1914 to 1917, bankruptcies did not begin to mount until about 1922. Of the 10 States shown above, 4 (Minnesota, Kansas, North Dakota, and Washington) had their peak in 1924; 2 (Iowa and Idaho) in 1925; and 4 (Nebraska, South Dakota, Montana, and Oregon) in 1926. In the United States as a whole there was marked stability from 1924 to 1926.

Reference has been made in another connection to the fact that failures are much more extensive among business establishments than among farming enterprises. This normal relationship held throughout the post-war period. However, the percentage increase of farm failures was very materially greater in this period than was that of business failures.

What, it may be asked, is the present credit standing of the grain-farming industry after this period of general financial difficulty? Little statistical evidence is available on this subject. Seed pools in 1927 seemed to be limited very largely to parts of Kansas and Oklahoma. The testimony as to the credit of farmers in buying at retail was so limited as not to permit of generalization. Bankers generally agreed that they now require greater security than formerly in making loans to farmers, but this may reflect as much the condition of the banks as it does the condition of agriculture. The record as to indebtedness, previously reviewed, leaves no doubt, however, that the farmer's credit standing is still weakened. Eventually, it is to be expected, as a result of the writing off of losses up to this date and the making up of other losses out of future earnings, agriculture will regain its former strong credit standing. The course of farm failures was still running at the conclusion of the hearings, but at a diminished rate. The good 1927 crop enabled the Pacific Northwest, last among the regions on which testimony as to economic conditions was taken, to show definite signs of improvement. What a later survey of other parts of the western district would have shown can not be said.

FARM MAINTENANCE: SALES OF FARM EQUIPMENT

These again are indirect indications of the condition of agriculture. Though no satisfactory statistical evidence was presented, it is clear that during a number of years farm properties in many sections were not maintained at their

customary or at an economical standard, and that the construction of new buildings was very limited. Expenditures for maintenance are, of course, among the first to be curtailed when earnings decline and may be among the last to be enlarged when earnings begin to improve. They reflect the working of the forces bearing on farm returns previously considered in a number of connections. There was some indication that maintenance was curtailed to facilitate the purchase of combines and other power machinery. Repeated poor crops also were a factor in some regions. Recovery in maintenance expenditures was indicated in the northern and western territory embraced in the later parts of our hearings, though the record is not clear as to how extensive the recovery has been. Evidence relating to other areas was received only as of an earlier date.

It is agreed that purchases of farm equipment and machinery dropped to a low level following the fall of agricultural prices. Total domestic sales by manufacturers amounted to some 223 million dollars in 1922, to 312 in 1923, 278 in 1924, 340 in 1925, 365 in 1926, and 390 in 1927. Difficulties in accepting the indicated increase in sales since 1925 as clear evidence of improved agricultural conditions arise from the lack of a normal volume of expenditures; from the fact that after purchases have been long deferred a point will be reached where further repairing of old equipment is impossible; and from the fact that a considerable part of the increase is attributable to the purchase of tractors and combines for use in regions of expanding wheat production, such as western Kansas and Nebraska and Montana, or for use in older regions where a large adjustment of production methods is in progress. Some reduction in the demand for machinery and equipment followed the decline in crop acreage. Part of the recovery in purchases in 1926 and 1927 was attributable to good crops, just as poor crops contributed to the lower volume of purchases in other years. The larger volume of purchases in later years is indicative of ability to buy, whether from earnings or by means of loans or extension of credit.

It is concluded from the evidence as to both maintenance and equipment expenditures that some improvement of agricultural conditions has occurred. It is impossible, however, to draw any general conclusion from this class of evidence as to how extensive the improvement has been.

HOME CONVENIENCES: STANDARD OF LIVING

Efforts to establish the existence of a depressed condition in agriculture by citing the limited number of farms equipped with certain modern conveniences can be given little weight, inasmuch as it was not established that these conveniences had been enjoyed in greater measure in some previous period of farm prosperity. An exception is the telephone, as to which the record shows in the State of Kansas a decline of 10 per cent from 1910 to 1920 in the number of subscribers of the smaller companies serving rural districts. A low or restricted standard of living is often associated with efforts to accumulate property. On the other hand, even a considerable increase in recent years in the number of farm homes equipped with modern conveniences, such as was shown to have occurred in the State of Nebraska, may throw little light on the condition of agriculture generally, if, even now, only a little over a tenth of the homes are equipped with one or more of these conveniences. The increase in the number of radio sets from 1925 to 1927 was, as would be expected, large, but Nebraska is the only State in which in 1927 more than half of the farm homes have radios. In Oklahoma 14 per cent had them; in Iowa, 45 per cent.

There is some evidence, though it is not extensive, to the effect that farmers in certain regions are working longer hours and making larger calls on their wives and children for help than formerly. The evidence as to the amount of schooling permitted the children of farmers in recent years is limited and inconclusive. In general, it is evident that the farmer's scale of values has changed and that he is making a greater effort than formerly to conform to the city dweller's standards in the matter of clothing, transportation, and perhaps other things. This change possibly explains in part the farmer's desire to economize on hired labor and on other items of farm-operating costs. The necessity of meeting obligations owing others is, of course, also an important factor.

Considerable was said about the extent and increase of farm-owned motor vehicles. From 1920 to 1926 farm-owned trucks increased in number 271 per cent in the western group of States, 177 per cent in the Mountain-Pacific group, and 259 per cent in the United States, while passenger cars so owned increased 67, 101, and 88 per cent, respectively. The smallest increases in the latter were in Iowa, Nebraska, Kansas, and South Dakota, while the largest were generally in States such as Louisiana and Arkansas, which in 1920 showed a small or moderate percentage of farms having motor vehicles. No evidence was presented as to the kinds of car purchased. The generally considerable and in some cases large increase in motor vehicles is indicative of buying power, though it is not shown of record when such power was possessed in greatest measure.

The conclusion reached is, then, that while there has been some necessary retrenchment of expenditures for hired labor and in other related farm operating costs, a part of the retrenchment which has occurred in these expenditures has been due to a shifting of values, indicative of an effort to raise the farmer's standard of living. The record gives no support for the view, expressed by a few, that the American farmer is passing into a condition comparable to that of the peasantry of other countries.

It was contended also that, if the farmer has not lost ground absolutely, he has lost relatively because of the advance in the city dweller's standard of living during and since the war. The inherent difficulties of comparing standards of living of different occupation groups are so great as to preclude any findings on this subject.

FARM POPULATION

The loss in farm population from January 1, 1920, to January 1, 1928, is estimated to have been 3,300,000 persons, or more than 10 per cent. The average loss from 1920 to the beginning of 1925 is set at 400,000 per annum, while that of the year 1925 is stated to have been 441,000, that of 1926, 649,000, and that of 1927, 193,000. These are, however, net figures and reflect births and deaths as well as other changes. In four recent years there have been movements from and to the farms estimated as follows:

Year	From farms to cities, towns, and villages	From cities, towns, and villages to farms	Net movement from farms
1924	2,075,000	1,396,000	679,000
1925	2,033,000	1,134,000	901,000
1926	2,155,000	1,135,000	1,020,000
1927	1,978,000	1,374,000	604,000
Average	2,061,000	1,260,000	801,000

In interpreting these figures, allowance must be made for the lag which characterizes population movements. This was set at about two years by one witness. The movement from the farms represents, of course, mostly that of farm hands and sons and daughters of farmers, since the number of owner operators and tenants has declined only slightly (some 75,000 from 1920 to 1925). There have been, however, many changes in the personnel of the owners and tenants.

The foregoing statistics relate to the country as a whole and to all branches of agriculture. Census figures indicate that the losses from 1920 to 1925 were particularly heavy in Montana, Idaho, Oklahoma, and Missouri. From January 1, 1926, to January 1, 1928, the number of persons living on farms declined 3 per cent in the United States, 3.8 per cent in the west north-central States, 4.1 per cent in the west south-central States, 5.1 per cent in the mountain States, and 2.8 per cent in the Pacific States. In some States there have been internal shifts of population, as from eastern Kansas to the newer wheat sections in the western part of the State, and from the predominantly wheat section of eastern Washington to a generally different type of agriculture in the western part of the State.

Those who stress the loss in farm population as an indication of the condition of agriculture concede that there is normally a net movement from farm to city and that this movement may have been accelerated in recent years by the increased efficiency of farm operations and by the wider use of machinery on the farms. It is urged, however, that the outflow since 1920 has been so very large as to leave no doubt as to the unsatisfactory condition of agriculture in this period.

It is difficult to assess the condition of an industry which has suffered a net loss of the magnitude indicated above and yet has abandoned only a minor part of its operations, maintained its earlier volume of production, and, in recent years, has been able to attract 6 people for every 10 it has lost. A number of forces are at work. On the one hand, the over expansion of agriculture under the stimulus of war conditions made a large loss of farm labor in the postwar period inevitable, and, similarly, the adverse postwar conditions prompted the development of more efficient farming methods and the adoption of labor-saving machinery. On the other hand, improved methods and the increased use of machinery can not be attributed entirely to the postwar condition of agriculture, and the attractions which the city has had do not necessarily reflect a distressed condition of agriculture. From such indexes as are available it is apparent that the real wages of industrial workers have been substantially greater than those of agricultural labor in the postwar period. Noneconomic considerations, beyond assessment, also play an important part in determining the movement from the farms, as they do the farmward movement also.

The large loss of farm population was, it may be concluded, part of an inevitable adjustment, rendered difficult because it was pressed into so short a period of time. This phase of the adjustment has been largely accomplished and it leaves the industry stronger than it otherwise would be.

FARM TENANCY

A high or an increasing proportion of tenancy has been varyingly interpreted on this record as signifying a normal condition of agriculture and a depressed one. The increase in Nebraska in the number of farms operated by tenants from 40.9 per cent in 1910 to 49.3 per cent in 1920 (from 38.1 to 42.9 per cent according to the Federal census) was cited as indicating that tenancy

may increase during a period of favorable agricultural conditions. The period here under review is, of course, that beginning with the fall in agricultural prices in 1920–21. Increases in tenancy occurred from 1920 to 1925 in most of the important grain States, as is indicated by the following table of percentage of tenants to all farmers:

State	1910	1920	1925	State	1910	1920	1925
Oklahoma	54.8	51.0	58.6	South Dakota	24.8	34.9	41.5
Kansas	36.8	40.4	42.2	Montana	8.9	11.3	21.9
Nebraska	32.1	42.9	44.4	Idaho	10.3	15.9	24.4
Iowa	37.8	41.7	44.7	Washington	13.7	18.7	16.3
Minnesota	21.0	24.7	27.1	Oregon	15.1	18.8	16.3
North Dakota	14.3	25.6	34.4				

The increases from 1920 to 1925 are particularly marked in Oklahoma, North Dakota, South Dakota, Montana, and Idaho. Decreases are found in Washington and Oregon, but it is of record that in Whitman County, a leading wheat county, tenancy in 1925 remained at the high figure of 41.1 per cent.

Tenancy is at best a very indirect line of evidence bearing on the present condition of agriculture. However, no evidence was presented in support of the contention that the increase of tenancy from 1920 to 1925 had the same significance as an increase would have had in an earlier period. On the other hand, the record, as previously pointed out, shows an unusually high rate of farm foreclosures and bankruptcies since 1920, which would indicate that the increase in tenancy resulted in many instances from a reversion from owner to tenant status. Such reversion was caused in part by inability to hold land purchased during the period of high prices. In some cases a voluntary retirement from ownership and reentry into agriculture on a tenant basis occurred. The testimony as to losses incurred by tenants on their operations, referred to elsewhere, indicates that the period since 1920 was also one in which it was difficult to secure the means of becoming an owner, despite the low land prices and the liberal terms offered by large holders of repossessed lands. Ownership in some places had little attraction, even on such terms.

No data are available for the period since 1925. For this reason and because evidence of this character is for the most part merely corroborative of that considered elsewhere, little weight should be assigned to tenancy in reaching a judgment as to the present condition of grain-growing agriculture.

MORE EFFICIENT FARMING; INCREASED DIVERSIFICATION

More efficient farming, by which presumably is meant more careful, more intelligent, and more sustained planning and execution of farm operations, is not in itself conclusive evidence as to the condition of agriculture. Whether improvement actually results can be tested only in terms of the financial returns, which have been considered elsewhere. As a shortrun proposition, increased efficiency may not contribute materially to the farmer's well being, if when output increases prices tend to fall. Those who achieve the greatest success doubtless better themselves. The effect on the general run of farmers may or may not be beneficial.

Increased diversification, in the sense of adding to the number of major crops, may signify the partial abandonment of relatively unprofitable crops or a desire either to minimize risks or to effect better crop rotation. Diversification which results from adding side lines such as dairy and poultry production may

signify merely the need for a more complete utilization of the farmer's time, or the need for products that can be more quickly turned into money, even if in only small amounts, or it may evidence a reduction of the farmer's standard of living through requiring him to work excessively long hours or through making farm life more self-supporting. It is safe to say that in the period since 1920 many farmers have learned the effects of too exclusive reliance on one crop. Their efforts to better themselves and such success as they have achieved can hardly be considered, however, conclusive evidence of either improvement or present well being.

BANKING EVIDENCE

Evidence drawn from the experience of banking institutions differs from that hitherto considered in being a stage removed from agriculture proper. It may be grouped under three main heads: Bank failures, bank earnings, and the volume of banking operations.

The record as to bank failures in the period since 1921 is generally known. It is shown in the subjoined table for the entire United States and for 11 individual States.

Failures of State, private, and national banks 1920–1928 year ending June 30

State	1920	1921	1922	1923	1924	1925	1926	1927	1928	Total
United States	47	358	396	274	915	542	573	831	484	4,420
Minnesota	1	3	14	11	76	46	63	83	42	339
Iowa	2	17	9	17	89	68	92	97	70	461
North Dakota	2	54	13	22	147	37	40	49	39	403
South Dakota	1	3	5	11	134	39	56	47	10	306
Nebraska	2	19	24	19	27	12	25	23	48	199
Kansas	2	4	17	17	33	14	23	37	36	183
Oklahoma	1	11	41	18	76	16	19	28	17	227
Montana	------	11	19	38	91	12	12	6	1	190
Idaho	------	16	12	14	4	12	3	7	2	70
Washington	------	6	6	5	10	6	5	4	------	42
Oregon	------	3	8	4	4	3	1	12	7	42
Total, 11 States	11	147	168	176	661	285	339	393	272	2,432
Percentage of United States total	23	41	42	64	72	49	59	47	56	55

The contrast between this showing and that of preceding periods is very marked. The record indicates that in the years 1900–1919, there were in all 10 failures in Iowa, 3 in Kansas, 14 in Nebraska, 27 in North Dakota, and 41 in South Dakota. In Massachusetts and New Jersey, cited as representative industrial States, there were 10 and 6 failures, respectively in 1900–1919, compared with 9 in Massachusetts and none in New Jersey from 1920–1925.

Bank failures in the 11 States above began to be conspicuous in 1921, when they numbered 147, increased slightly in 1922 and 1923, reached a peak of 661 failures in 1924, then dropped to 285, rose to 339 in 1926 and to 393 in 1927, falling to 272 in the year ended June 30, 1928. Variations from this general trend are particularly Minnesota, Iowa, and Kansas, where the peak occurred in 1927, and Nebraska, where the peak occurred in 1928. The 11 States accounted in 1924 for 72 per cent of the total failures of the country and thereafter for from 47 to 59 per cent of the total.

More comprehensive information was put in the record for bank suspensions. The relation between suspensions and failures is roughly indicated by the fact that from January 1, 1921, to December 31, 1927, there were in the country at large 4,518 suspensions, while from July 1, 1921, to June 30, 1928, a period of equal length, 4,015 failures were reported.

In the United States as a whole the peak in suspensions came in 1926. The distribution by years and sections is as follows:

Section	1921	1922	1923	1924	1925	1926	1927	1928 [1]	Total
New England	7	2	3	1	2	-------	1	-------	16
Middle Atlantic	8	5	8	8	8	6	10	1	54
East north-central	29	17	31	39	34	67	91	31	339
South Atlantic	101	55	59	75	102	206	93	44	735
East south-central	12	13	10	23	21	25	30	9	143
West north-central	135	99	302	401	306	523	308	148	2,222
West south-central	108	80	86	92	71	86	88	26	637
Mountain	80	67	139	121	56	31	19	7	520
Pacific	22	16	12	17	12	12	22	3	116
Total	502	354	650	777	612	956	662	269	4,782

[1] To June 30.

In the west north-central States, where suspensions were so conspicuous, the peak came in 1926, but in the west south-central group 1921 was the highest year, and in the mountain States, 1923. There is, however, a lag of indeterminate length to allow for, and of course each succeeding year of failures reduces the number of banks subject to failure in the future.

The deposits of suspending banks followed much the same course. The peak year in each of the four sections was identical with that given above. The aggregate of the deposits of banks suspending during the period from January 1, 1921, to June 30, 1927, was as follows:

West north central	$537,175,000
West south central	164,855,000
Mountain	151,152,000
Pacific	55,206,000
Total	908,388,000
United States	1,310,041,000
Ratio (per cent)	69.3

While it is generally understood that many banks were saved from failure by assessments against the stockholders, no specific data were presented on this subject.

The evidence as to recoveries by depositors through liquidation was of rather limited extent. In South Dakota recoveries were stated to have reached nearly 50 per cent in 1927; in Wisconsin an average loss of 20 per cent was stated by the banking commissioner to be "very conservative"; in Washington recovery through liquidation was put in 1928 at about 70 per cent.

What is the bearing of this recital of bank failures on the condition of agriculture? Use of such evidence carries the implication that banks failed because agriculture failed. There is abundant indication that the condition of agriculture contributed directly and unmistakably to this record of failures. With the drop and continued low level of agricultural prices and with heavy losses on inventory, particularly in the livestock industry, came inability to meet short-term indebtedness at the banks and withdrawals of deposits to pay running expenses. The mortgages which the banks held or came to require to secure themselves in turn declined greatly in value as land prices fell, and a large amount of "other real estate" found its way onto the banks' books as the result of foreclosures or voluntary surrenders by mortgagors. The process is so generally understood as not to require more detailed description.

It is urged, however, that factors other than the condition of agriculture contributed to the distressed condition of the banks in western territory. There is reason for agreeing that such was the case. But, first, how far were the banks which failed identified with agriculture?

There are several ways of demonstrating that the banks which encountered difficulties were preponderantly small banks serving an agricultural clientele. The following is perhaps the simplest approach. Of the 1,056 suspensions which occurred in the Middle Western, Western, and Pacific States in the years 1924 and 1925, 453 took place in places of less than 500 population, 769 in places of less than 1,500 population, and 950, or 90 per cent, in places of less than 5,000 population. Livestock and other branches of agriculture contributed to this result as well as did the grains. In particular localities, droughts or other adverse weather conditions proved to be decisive factors, while in other instances favorable crop condition made it possible to postpone the threatened insolvency. Banks serving so exclusively a single industry were, of course, peculiarly vulnerable to adverse conditions of any character.

Testimony of State banking commissioners and others well informed as to banking conditions places no small part of the responsibility for the distress of the banks on bank management itself. Too many banks came to be chartered, sometimes under the encouragement of lax State banking laws; the banks were not only excessive in number but predominantly of such small size, with so little capital, as to make them weak institutions under any condition; inexperienced officials were placed in charge of many of them; and banking was carried on in many instances along lines which, by any reasonable standard, can not be said to have been conservative. Poor judgment frequently was shown in making loans, and speculative activities were sometimes encouraged by the banks themselves. To a minor extent dishonest practices were a contributing factor. Changes in the demand for the services of rural banks resulting from the rise of newer Government credit agencies or from the enlargement of the territory which the stronger and larger banks can reach with the increased provision of good roads probably contributed in only minor degree to the condition under discussion.

Though by no means all of the banks which failed were comparatively new institutions, or small in size, or operated by inexperienced officials, it can reasonably be concluded that poor banking was in large measure responsible for the breakdown which occurred. Even a slight decline in the condition of agriculture would have proved difficult to a great many of the banks. This conclusion, while helping to explain the unusual record of failures in the period since 1921, does not absolve agriculture from a large share of the responsibility. The condition of agriculture became such as to put to a severe test even the soundest type of banking organization.

What conclusion can be reached on the basis of bank failures as to the present condition of agriculture? The peak year in bank failures in the 11 States hitherto indicated came in 1924, but bank suspensions in the four western groups of States as a whole reached their peak in 1926, with 1924 only slightly below it. Bank failures and suspensions have continued to occur, however, in excessive degree, even after the elimination of great numbers of the weaker banks. Though allowance must be made for the time which intervenes between the occurrence of conditions leading to failure and the actual recognition of insolvency, the record of sustained failures and suspensions in recent years is indicative of the fact that agriculture is still undergoing a process of liquidation. This process appears to have been more nearly completed in the

Mountain and Pacific States than elsewhere in western territory, with such States as Minnesota, Iowa, North Dakota, South Dakota, Kansas, and Nebraska still recording large numbers of failures or suspensions.

The banking evidence so far reviewed serves, however, more to throw light on what has happened in agriculture than to indicate whether any improvement in the agricultural situation has occurred in recent years. Other phases of banking must be looked to for evidence of this character.

Testimony as to the earnings of banks in recent years was offered for only the national banks outside of the reserve cities. No general method of measuring the earnings of the small rural banks, usually operating under State charter, is possible from the record. The current net earnings of the national banks in 1916, the first year of record, in 1920, the peak year of the war and postwar period, in 1924 or other year of lowest postwar earnings, and for the year ending June 30, 1928, are as follows (in thousands of dollars):

	Years ended June 30—			
	1916	1920	1924	1928
West north-central:				
Minnesota	$3,088	$4,001	$2,667	$3,357
Iowa	3,867	4,866	[2] 2,550	3,160
Missouri	1,053	1,461	[3] 1,069	1,127
North Dakota	1,459	962	261	1,107
South Dakota	1,168	1,450	578	991
Nebraska	1,902	2,250	[3] 1,218	1,385
Kansas	2,401	3,125	1,920	2,515
Total	14,938	18,115	----------	13,642
West south-central:				
Arkansas	850	1,571	[4] 1,238	1,323
Louisiana	549	1,653	894	1,910
Oklahoma	3,122	4,353	[3] 2,076	3,499
Texas	7,562	12,155	[3] 7,092	9,382
Total	12,083	19,732	----------	16,114
Mountain	6,857	8,295	[3] 4,166	----------
Pacific	5,747	10,534	[3] 7,775	11,238

[1] 1926. [2] 1922. [3] 1925. [4] 1921.

Difficulties in the interpretation of this table arise from the varying number of banks whose earnings are recorded, from the fact that it was the stronger banks which survived, and from changes in the general level of prices. Also the banks represented serve a nonagricultural as well as an agricultural clientele. Certain general trends may be mentioned, however.

Earnings in 1920 in the four regions indicated were approximately 43 per cent greater than they were in 1916. In the lowest year thereafter they sank in 8 out of the 11 individual States below the 1916 level. In 9 out of the 11 States the lowest earnings occurred in or before 1924, with Nebraska's low year in 1925 and Iowa's in 1926. In the Mountain and Pacific groups as a whole 1925 was the lowest year. Improvement dating back from two to seven years has brought the 1928 earnings above the 1916 level in all States but Iowa, North Dakota, South Dakota, and Nebraska, but, so far as information is available, only in the Pacific group (barring North Dakota, whose 1920 earnings were below those of 1916), were the 1928 earnings above those of the year 1920. While differences in the number of banks and the fact that the weaker banks have been eliminated must be allowed for, it is reasonable to

conclude that the current earnings of national banks in western territory outside of the reserve cities have shown substantial recovery in recent years. This conclusion is reenforced by the large reduction of the general price level since the forepart of 1920. However, as will be indicated, these do not represent earnings distributable as dividends or available for additions to surplus.

Similar improvement throughout the year 1926, the last year for which data have been made available, is shown in the ratio of current net earnings to capital and surplus. In the west north central States a high of 15.69 per cent was reached in 1919, with successive declines thereafter to 1924, and recovery in 1925 and 1926 to 10.21 per cent. In the west south-central group of States 1920 was the high year with earnings of 18.59 per cent; declines occurred through 1923, with recovery since to 13.83 in 1926. However, net losses charged off by these national banks continued to be large in 1928 and very much in excess of what they were in the war period. There have been, however, moderate declines in the losses charged off since 1925, generally the peak year in the west north-central States and since 1922, the peak year in the west south-central group. In the Pacific group, however, 1928 showed larger losses written off than in any year since 1916, the earliest year for which this information is of record. The ratio of net additions to profits to capital and surplus, therefore, continues throughout western territory below that of the years 1916–1920, though here also substantial improvement is shown over the low years of 1921–1924.

Attempts were made to throw light on the condition of the banks by noting changes in the amount of interbank borrowing. During the period of severe stress among the banks the volume of such borrowing ran sharply up. It has, however, been very greatly reduced, though in some instances by conversion after the liquidation of the debtor bank rather than by outright payment. This line of evidence is not conclusive, however, and at best is only corroborative of that considered elsewhere.

An effort was made to show the present condition of agriculture by noting the volume of banking transactions. This was measured principally by the item "debits to individual accounts." Data on this item are rather general in character, being given on the record for only the 141 reserve cities of the country. Attention was called by a shipper witness to the fact that such debits aggregated 16.2 billions in 1920 in the reserve cities of the Kansas City Federal-reserve district and to only 14.8 billions in 1926, compared with 23.1 billions and 31 billions in the Boston district. In the Minneapolis district the 1920 total was 8.5 billions and in 1926, 8.3. The base period is one of exceptional volume of banking business. It is impossible to state what part of these debits represents agricultural, including livestock, transactions. Also, an increased aggregate, so far as agriculture has contributed to it, might arise either from an increased volume or an increased price of agricultural products, neither of which by itself would necessarily signify improvement of farm conditions.

An index of debits to individual accounts on a 1919 base indicates that in the reserve cities, after the exclusion of New York City, debits to the middle of 1927 were 31.2 per cent above the base compared with a decline of 3.8 per cent in the west north-central States, and with increases of 23.4 per cent in the west south-central States, of 8.6 per cent in the Mountain States, and of 72.9 per cent in the Pacific States. In all sections substantial improvement is shown over the low years 1921 and 1922, as is also true of the individual States of record except South Dakota and Nebraska. It is to be borne in mind that the

base period used in this index is 1919, and also that a large decline has occurred in the level of prices entering into financial transactions.

Statistics of net demand deposits are given for banks situated in cities of less than 5,000 population which are members of the Federal reserve system. For the same four groups of States elsewhere shown, changes have occurred as follows:

Section	Net demand deposits (billions)		
	Apr. 25, 1923	Apr. 22, 1925	Apr. 11, 1928
West north central	$260.3	$261.4	$242.9
West south central	233.7	300.0	289.9
Mountain	88.8	80.1	87.7
Pacific	135.4	130.1	121.5
United States	1,600.3	1,637.9	1,655.9

These statistics are confined to member banks and therefore leave out the greater number of State institutions. Changes in the value of the dollar must be considered, and for full interpretation considerable analysis, not here undertaken, of how these deposits were created is required. Such analysis would require more information as to the item "loans and discounts" than is of record. Only in the Mountain States is the 1928 figure over that of 1925. In the country as a whole, however, such small banks showed, comparing like months, small but erratic and moderate increases from 1923 on. There was some testimony to the effect that people are carrying more currency than formerly, but no concrete information was offered. The figures given cover such broad areas as not to reveal local situations where the trend may differ from the general one.

Time deposits may also be given for member banks situated in places of less than 5,000 population.

	Time deposits (billions)		
	Apr. 25, 1923	Apr. 22, 1925	Apr. 11, 1928
West north central	$305.0	$308.9	$248.5
West south central	47.8	57.0	60.4
Mountain	55.1	50.4	57.1
Pacific	74.1	85.2	91.8
United States	1,471.7	1,691.1	1,958.1

Except in the west north-central States, improvement is shown in 1928 over both 1925 and 1923. The improvement is less, however, than that shown for the country as a whole. Limitations of the data are generally similar to those indicated in the discussion of demand deposits.

Related to the item of deposits is that of bank investments. An increase of the latter is said to signify that deposits have outrun the local demand for loans. Satisfactory demonstration that this is true was not provided in the case of the banks serving principally an agricultural clientele. Investments of all banks in western territory in 1926 showed a considerably greater percentage increase over 1920 than did those of banks in the country as a whole, though with some decline thereafter. No separation is made between investments

made possible through the deposits of agriculturists and of others. Also, the fact that banks' funds are available for investment may signify an excess of funds over normal demand, or it may signify an inability to borrow money owing to the lack of required security or to contraction of operations. No measurement of the relative importance of these two forces has been offered. Indication has been given elsewhere, however, that the farmer's credit, generally speaking, is still below normal. Loans and discounts showed continuing weakness in the west north-central States from the high year 1920 to 1926; in the west south-central States they had recovered in that year to about 88 per cent of the peak; in the Mountain States to 65 per cent of the peak; and in the Pacific States they were 35 per cent over the peak. But the figures available relate to all banks and can not be separated between agricultural and nonagricultural loans or between those which arise from grain, from livestock, and from other branches of farming operations.

CONCLUSIONS

Various indices of the condition of agriculture have been reviewed. Some of these have related to the industry as a whole and others more specifically to grain agriculture. While all indicate that there has been substantial, though not complete, recovery from the effects of the industry's war and post-war experiences, those bearing more directly on the condition of the grain producer give evidence of inability to hold all the gains made during the period of four or five years following the low year 1921–22.

Agriculture as a whole is carrying a heavier burden of interest and taxes than it did before the war and shares with other classes of American society the desire to maintain a standard of living which has risen in considerable measure in the last decade or so. Its indebtedness was incurred during the period of high prices for purposes previously indicated or was accumulated as the result of the conditions which followed the collapse of agricultural prices. Some of this indebtedness has been wiped out by the process of foreclosure and bankruptcy, while many farmers never became involved in it. At the present time this burden is therefore unevenly distributed. Where the losses had not been fully taken earlier, foreclosures and bank failures were still running at an unusual rate at the time of the hearings.

The depressant factor in grain agriculture, operating particularly with respect to wheat and oats, is redundancy of supplies. Wheat in the crop year 1927–28 had 90 per cent of its pre-war purchasing power, in July, 1928, 85 per cent, and in September, 69 per cent. There is no immediate prospect of reduction of supplies or of significant expansion of demand. The competition of newer domestic and foreign sources of supply, some of which use modern power equipment in an effort to achieve low costs and operate under more favorable conditions, is particularly felt by the older regions of wheat production. Falling demand has contributed largely to weakness in the position of the oats producer. Corn has been more successful in maintaining its recovery, owing to improvement in the livestock industry.

Not all of the difficulties of grain agriculture are attributable to heavy interest and tax charges and redundant supplies. Adverse climatic conditions have played a large part in some years, and in some regions declining fertility is a factor of considerable importance.

The evidence indicates that, taken as a whole, there is depression in the grain-producing industry.

APPENDIX D

STATEMENT OF PRESENT AND PRESCRIBED RATES

[In cents per hundred pounds]

Proportional rates

	Present (wheat)	Prescribed (wheat and coarse grains)
To Duluth from—		
Minneapolis	6.5	4.5
Sioux City	17.5	13
Omaha	17.5	16
Kansas City	19	20
To Minneapolis from—		
Sioux City	16.5	8.5
Omaha	16.5	11.5
Kansas City	17.5	15.5
To Chicago from—		
Minneapolis	13	11
Sioux City	17.5	15
Omaha	17.5	15
Kansas City	17.5	15
To St. Louis from—		
Sioux City	17.5	16
Omaha	13.5	13
Kansas City	13.5	9
To Kansas City from—		
Omaha	8	6
To Omaha from—		
Sioux City	4.5	3
To Memphis from—		
Omaha	25	22
Do	[1] 22.5	22
To Memphis from—Continued.		
Kansas City	24	16
Do	[1] 21.5	16
St. Louis	11.5	9
Do	[1] 9	9
To New Orleans from—		
Memphis	17	10
St. Louis	[2] 28.5	19
Kansas City	[2] 41	26
Omaha	[2] 42	32
To Texas Group 3 from—		
Kansas City	37	21
Omaha	45	27
St. Louis	37	23
To Louisiana Group 3 from—		
Kansas City	41	[3] 26
Omaha	45	[3] 32
St. Louis	37	[4] 23
To Little Rock from—		
Kansas City	26.5	16
Omaha	31	22
St. Louis	23.5	10
To Texarkana from—		
Kansas City	31	16
Omaha	35	22
St. Louis	31	16

[1] For the Southeast.
[2] Domestic.
[3] West of the Rock Island from Randolph south through Ruston, Alexandria, and Eunice 8 cents less.
[4] On and east of above line 4 cents less.

Export rates

	Present	Prescribed
Kansas City to Texas Group 3	23.5	[1] 21
Omaha to Texas Group 3	24.5	[1] 27
Omaha to Montreal	[2] 31.5	[2] 29
Kansas City to Montreal	[2] 31.5	[2] 29
Omaha to Baltimore	38.5	31
Kansas City to Baltimore	38.5	31
Omaha to New Orleans	24.5	27
Kansas City to New Orleans	23.5	21
St. Louis to Baltimore	25	22
St. Louis to New Orleans	11	14
Chicago to Baltimore	21	16
Central Illinois to Baltimore	32.5	27.5
Central Illinois to New Orleans	22.5	23.5

[1] Also the domestic rates.
[2] Through charge to Montreal is made by adding to the proportional rate of 17.5 cents to Chicago lake charges, not subject to the interstate commerce act, said to approximate 14 cents beyond.
[3] Through charge to Montreal will be made by adding to the reduced proportional rate of 15 cents to Chicago lake charges, not subject to the interstate commerce act, said to approximate 14 cents beyond.

Flat rates (California to Arizona, New Mexico, and El Paso, Tex.)

To—	From Wood		From Marysville		From Sacramento	
	Present wheat and coarse grains	Prescribed wheat and coarse grains	Present wheat and coarse grains	Prescribed wheat and coarse grains	Present wheat and coarse grains	Prescribed wheat and coarse grains
	Cents	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
Yuma, Ariz.	60.5	46.5	44.5	39.5	41	37
Phoenix, Ariz.	63.5	49	57.5	41	57.5	39.5
Maricopa, Ariz.	63.5	51.5	52.5	44.5	52.5	43
Tucson, Ariz.	63.5	54.5	57.5	48	57.5	46
Bowie, Ariz.	63.5	57.5	59	51.5	59	50
Kingman, Ariz.	68.5	44.5	59	37	59	35
Ash Fork, Ariz.	68.5	48.5	59	41	59	39.5
Flagstaff, Ariz.	68.5	50	60	43	60	41
Albuquerque, N. Mex.	68.5	61	68	54.5	68	53
Lordsburg, N. Mex.	63.5	59	59	52.5	59	51.5
El Paso, Tex.	63.5	63.5	59	57.5	59	56.5

Flat rates (from California to California)

To—	From Sacramento			From Guinda			From Woodland		
	Present wheat	Present coarse grains	Prescribed wheat and coarse grains	Present wheat	Present coarse grains	Prescribed wheat and coarse grains	Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Los Banos	14.5	14.5	13	31	31	15	20.5	20.5	13.5
Merced	16	16	12.5	31	31	15	19	19	13
Fresno	18.5	18.5	14.5	34.5	34.5	17.5	22	22	15.5
Coalinga	22	22	17.5	38	38	19.5	26	26	18.5
Tulare	20.5	20.5	16	36.5	36.5	19	24	24	17
Porterville	22	22	17	38	38	20	25.5	25.5	18
Bakersfield	23	23	18.5	38.5	38.5	21	26.5	26.5	19.5
Buttonwillow	23	23	20	39	39	22.5	30	30	20.5
Santa Cruz	22.5	22.5	14.5	35	35	14.5	22.5	22.5	14
Salinas	25.5	25.5	15.5	37	37	16	29	29	15
San Luis Obispo	29	29	20	40.5	40.5	21	32.5	32.5	20
Santa Barbara	34.5	34.5	24	46	46	25	35	35	24
Los Angeles	31.5	31.5	25	46	46	26.5	35	35	25.5
Santa Ana	34	34	26	49.5	49.5	28	35	35	26.5
San Bernardino	35.5	35.5	26.5	57.5	57.5	28.5	39	39	27
Calexico	41	41	31.5	60.5	60.5	34	44.5	44.5	32

To—	From Marysville			From Chico			From Cole		
	Present wheat	Present coarse grains	Prescribed wheat and coarse grains	Present wheat	Present coarse grains	Prescribed wheat and coarse grains	Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Los Banos	20.5	20.5	14.5	25	25	16	30.5	30.5	24
Merced	19	19	14.5	27	27	16	30.5	30.5	24
Fresno	22	22	16	27	27	17.5	41	41	25.5
Coalinga	26	26	19.5	36.5	36.5	21	46.5	46.5	28.5
Tulare	24	24	18	33.5	33.5	19.5	45	45	27
Porterville	25.5	25.5	19	33.5	33.5	20	45	45	28
Bakersfield	26.5	26.5	20	33.5	33.5	21.5	45	45	30
Buttonwillow	27	27	21	37	37	23.5	47.5	47.5	30.5
Santa Cruz	28	28	15.5	31.5	31.5	17	45	45	25
Salinas	31	31	16.5	35.5	35.5	18	46	46	25.5
San Luis Obispo	32.5	32.5	21	38	38	23.5	46	46	30.5
Santa Barbara	35	35	25.5	38	38	27	46	46	33
Los Angeles	35	35	26	38	38	27	46	46	34
Santa Ana	35	35	27	38	38	28.5	55	55	35
San Bernardino	30	30	28	41.5	41.5	29	50	50	36.5
Calexico	44.5	44.5	32.5	50.5	50.5	34.5	56.5	56.5	41

California to San Francisco Bay ports

From—	To San Francisco [1]		To Port Costa [1]	
	Present wheat and coarse grains	Prescribed wheat and coarse grains	Present wheat and coarse grains	Prescribed wheat and coarse grains
Bakersfield	23	19.5	23	19
Nord	19	14.5	17.5	13.5
Nelson	19	14	17.5	13
Tulare	21	17	20.5	16
Exeter	21	17.5	20.5	16.5
Stratford	21	17	21	16
Coalinga	22	17.5	22	17
Fresno	19.5	15.5	18.5	14.5
Cole	28	22	28	21
Merced	17	13	16	12.5
Dorris	32.5	22.5	32.5	21
Tracy	7.5	10	5.5	9
Modesto	12.5	12	11.5	11
Oakdale	11.5	13	10.5	12
Stockton	7.5	11.5	7.5	10
Lodi	10	12	7.5	11
Valley Springs	17.5	13	16.5	12
Fruto	19	14.5	17.5	13
Galt	10.5	12.5	9	11
Red Bluff	20	15.5	18.5	14.5
Walnut Grove	10.5	12.5	10.5	11
Sacramento	10.5	11	10	9
Roseville	15	12	13.5	10
Marysville	15.5	13	14	11.5
Colusa	18	13	16.5	12
Knights Landing	14	11.5	12.5	9.5
Josephine	18	12.5	16.5	11
Oroville	17.5	13.5	16	12.5
Chico	19	14.5	17.5	13
Willows	18	13.5	16.5	12.5
Salinas	17.5	12.5	19	13
Princeton	19	13.5	17.5	12.5

[1] Oakland takes same rates as San Francisco, and South Vallejo same as Port Costa.

California to Los Angeles

	Present wheat and coarse grains	Prescribed wheat and coarse grains		Present wheat and coarse grains	Prescribed wheat and coarse grains
Calipatria	23	18.5	Oakdale	21.5	21.5
El Centro	24	16	Tracy	21.5	23
Calexico	25.5	16.5	Huron	21.5	19
Westmoreland	25.5	16	Knowles	21.5	20
Sandia	26.5	18	Salinas	21.5	21.5
Holtville	26.5	16.5	Tres Pinos	21.5	23.5
Milton	21.5	23			

Colorado to Chicago

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Fowler	50.5	45.5	43	Stratton	41	37	39
Vroman	50.5	45.5	43	Flagler	44.5	40	39.5
Las Animas	46.5	42	42	Limon	50.5	45.5	43
Lamar	44.5	40	41	Peyton	50.5	45.5	43
Timpas	50.5	45.5	43	Brandon	43	38.5	42.5
Delhi	50.5	45.5	43	Haswell	45.5	41	43
Wray	40.5	36.5	38	Olney	50.5	45.5	43
Yuma	47	42.5	39	Sedgwick	48	43	38
Platner	50.5	45.5	43	Proctor	50.5	45.5	43
Hudson	50.5	45.5	43	Orchard	50.5	45.5	43
Longmont	50.5	45.5	43	Kersey	50.5	45.5	43
Fleming	50	45.5	39.5	River Bend	50.5	45.5	43
Ariba	46.5	42	40	Frederick	50.5	45.5	43
Sterling	50	45	43	Koenig	50.5	45.5	43
Keota	50.5	45.5	43	Lucerne	50.5	45.5	43
Cheyenne	50.5	45.5	43	Carr	50.5	45.5	43
Merino	50.5	45.5	43				

Colorado to Missouri River

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Fowler	33	29.5	28	Stratton	23.5	21	24
Vroman	33	29.5	28	Flagler	27	24.5	24.5
Las Animas	29.5	26.5	27	Limon	33	29.5	28
Lamar	27	24.5	26	Peyton	33	29.5	28
Timpas	33	29.5	28	Brandon	25.5	23	27.5
Delhi	33	29.5	28	Haswell	28	25	28
Wray	23	20.5	23	Olney	33	29.5	28
Yuma	29.5	26.5	24	Sedgwick	30.5	27.5	23
Platner	33	29.5	28	Proctor	33	29.5	28
Hudson	33	29.5	28	Orchard	33	29.5	28
Longmont	33	29.5	28	Kersey	33	29.5	28
Fleming	32.5	29.5	24.5	River Bend	33	29.5	28
Ariba	29	26	25	Frederick	33	29.5	28
Sterling	33	29.5	28	Lucerne	33	29.5	29
Keota	33	29.5	28	Koenig	33	29.5	28
Cheyenne	33	29.5	28	Carr	33	29.5	28
Merino	33	29.5	28				

Eastern Colorado transcontinental Groups G and J to New Mexico and El Paso, Tex.

	Present wheat[1]	Present coarse grains[2]	Prescribed wheat and course grains		Present wheat[1]	Present coarse grains[2]	Prescribed wheat and coarse grains
Domingo	61	54.5	28.5	Columbus	61	54.5	40
Bernalillo	61	54.5	29	Hachita	61	54.5	40.5
Albuquerque	61	54.5	30.5	Animas	61	54.5	41.5
Belen	61	54.5	31	Rodeo	61	54.5	41.5
San Antonio	61	54.5	32.5	Laguna	61	54.5	32.5
San Marcial	61	54.5	34	Grants	61	54.5	33.5
Engle	61	54.5	35	Baca	61	54.5	34
Las Cruces	61	54.5	37.5	Thoreau	61	54.5	36.5
Berino	61	54.5	38	Perea	61	54.5	35
Hatch	61	54.5	36.5	Gallup	61	54.5	35.5
Deming	61	54.5	38	El Paso, Tex	61	54.5	39.5
Lordsburg	61	54.5	40.5				

[1] Average of present rates of 49 and 63 cents.

[2] Average of present rates of 53 and 56.5 cents.

From eastern Colorado transcontinental Groups G and J to Arizona

	Present wheat[1]	Present coarse grains[2]	Prescribed wheat and coarse grains		Present wheat[1]	Present coarse grains[2]	Prescribed wheat and coarse grains
Chambers, Ariz.	61	54.5	37.5	Naco	61	54.5	44.5
Navajo	61	54.5	37.5	Bisbee	61	54.5	45.5
Holbrook	61	54.5	39.5	Douglas	61	54.5	43.5
Winslow	61	54.5	40	Nozales	61	54.5	48
Flagstaff	61	54.5	42.5	Willcox	61	54.5	43
Williams	61	54.5	43.5	Benson	61	54.5	44.5
Seligman	61	54.5	45.5	Tucson	61	54.5	46.5
Kingman	61	54.5	48.5	Casa Grande	61	54.5	48.5
Clarkdale	61	54.5	46.5	McNary	89	82.5	41.5
Prescott	61	54.5	46.5	Ajo	64.5	58	53
Phoenix	61	54.5	49	Clifton	67	60.5	43
Fairbank	61	54.5	45.5	Safford	64.5	58	41.5
Lowell	61	54.5	44.5	Globe	67	60.5	46.5
Curtis	61	54.5	44.5	Miami	67	60.5	47
Patagonia	61	54.5	47	Needles, Calif.	61	54.5	48.5

[1] Average of present rates of 59 and 63 cents. [2] Average of present rates of 53 and 56.5 cents

Colorado to Texas Group 3

	Present wheat	Present coarse grains	Prescribed wheat and coures grains[1]		Present wheat	Present coarse grains	Prescribed wheat and coarse grains[1]
Colorado common points[2]	61	55	49	Planter	61	55	49
Sterling	61	55	49	Limon	61	55	49
Wray	56	50.5	44	Lamar	61	55	49

[1] Combination on Kansas City. [2] Denver, Pueblo, and Trinidad.

From Colorado to Louisiana Group 3, on and east of the Rock Island south through Ruston, Alexandria, and Eunice, including New Orleans [1]

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains[2]		Present wheat	Present coarse grains	Prescribed wheat and coarse grains[2]
Colorado common points[3]	64	57.5	54	Platner	64	57.5	54
Sterling	64	57.5	54	Limon	64	57.5	54
Wray	60	54	49	Lamar	64	57.5	54

[1] West of the line described, 3 cents less.
[2] Combination on Kansas City.
[3] Denver, Pueblo, and Trinidad.

From eastern Colorado transcontinental groups to the Pacific coast [1]

To—	Present wheat	Present coarse grains	Prescribed wheat and coarse grains
North Pacific coast	59	53	53
San Francisco and Los Angeles	[2] 61	[3] 54.5	55

[1] Rates from other eastern transcontinental groups to be revised to maintain existing differentials over Colorado.
[2] Average of present rates of 59 and 63 cents.
[3] Average of present rates of 53 and 56.6 cents.

Idaho to Omaha and Kansas City

	Present wheat and coarse grains	Prescribed wheat and coarse grains		Present wheat and coarse grains	Prescribed wheat and coarse grains [1]
American Falls	51	46	Mackey	52	47
Twin Falls	52	47	Paris	48	43
Mountain Home	54	49	Rexburg	52	47
Caldwell	55	50	Utah common points (Ogden and Salt Lake)	48	43
Montpelier	48	43			

[1] Made by adding to the rates from Denver the differentials over Denver prescribed in *Ogden Grain Exchange* v. *A. & S. R. R. Co., et al.*, 122 I. C. C. 691, Docket 16112. Rates from other points in Idaho and Utah to be related to those from points named herein in the manner required in Docket 16112. Rates from points on the Gilmore & Pittsburgh Railroad should not exceed those from the Butte, Mont., group

Idaho to Texas Group 3, including Houston and Galveston

	Present wheat and coarse grains	Prescribed wheat and coarse grains [1]		Present wheat and coarse grains	Prescribed wheat and coarse grains [1]
American Falls	79	67	Twin Falls	80	68
Mountain Home	82	70	Caldwell	83	71
Pocatello	76	67	Cambridge	98	74
Idaho Falls	80	68			

[1] Combination of proportional rate of 28 cents from Denver to Kansas City, proportional rate of 21 cents from Kansas City to Houston, and arbitraries from Idaho over Denver prescribed in Docket 16112. Other points in Idaho and Utah common points to be 15 cents over Denver in accordance with arbitraries prescribed in that case. Rates from points on the Gilmore & Pittsburgh Railroad to be not higher than from the Butte, Mont., group.

Washington and Idaho, north of Snake River, to Seattle

	Present wheat and coarse grains	Prescribed wheat and coarse grains		Present wheat and coarse grains	Prescribed wheat and coarse grains
Pullman, Wash	24	21	Spokane, Wash	[redacted]	21
Palouse, Wash	24	21	Almota, Wash	24	21
Colfax, Wash	24	21	Moscow, Idaho	24	21
Garfield, Wash	24	21	Genesee, Idaho	24	21
Oaksdale, Wash	24	21	Lewiston, Idaho	24	21
Farmington, Wash	24	21	Kendrick, Idaho	24	21
Rosalia, Wash	24	21	Peck, Idaho	24	21
Spring Valley, Wash	24	21	Plummer, Idaho	24	21
Freeman, Wash	24	21	Cottonwood, Idaho	31	28
Thornton, Wash	24	21	Craigmont, Idaho	30	28
Spangle, Wash	24	21	Grangeville, Idaho	31	28
Steptoe, Wash	24	21			

Washington and Idaho, north of Snake River, to Portland

	Present wheat and coarse grains	Prescribed wheat and coarse grains		Present wheat and coarse grains	Prescribed wheat and coarse grains
Pullman, Wash.	24	21	Spokane, Wash.	24	21
Palouse, Wash.	24	21	Almota, Wash.	24	21
Colfax, Wash.	24	21	Moscow, Idaho	24	21
Garfield, Wash.	24	21	Genesee, Idaho	24	21
Oaksdale, Wash.	24	21	Lewiston, Idaho	24	21
Farmington, Wash.	24	21	Kendrick, Idaho	24	21
Rosalia, Wash.	24	21	Peck, Idaho	24	21
Spring Valley, Wash.	24	21	Plummer, Idaho	24	21
Freeman, Wash.	24	21	Cottonwood, Idaho	31	23
Thornton, Wash.	24	21	Craigmont, Idaho	30	23
Spangle, Wash.	24	21	Grangeville, Idaho	31	23
Steptoe, Wash.	24	21			

Idaho to Portland

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Weiser	30	30	24	Bancroft	47	47	36
Mesa	44	44	26.5	Montpelier	47	47	37.5
Boise	35	35	27	Pocatello	44	44	34
Twin Falls	44	44	34	Idaho Falls	44	44	36
Burley	43	43	32.5	Pirie	45	45	36.5
Shoshone	42	42	31	Ashton	46	46	37.5
Fairfield	44	44	32.5	Tetonia	47	47	38.5
American Falls	44	44	34	Mackey	47	47	38

Southern Idaho and Utah common points to California

From—	To San Francisco		To Los Angeles		To Weed		To Fresno		To Bakersfield		To Santa Barbara	
	Present wheat and coarse grains	Prescribed wheat and coarse grains	Present wheat and coarse grains	Prescribed wheat and coarse grains	Present wheat and coarse grains	Prescribed wheat and coarse grains	Present wheat and coarse grains	Prescribed wheat and coarse grains	Present wheat and coarse grains	Prescribed wheat and coarse grains	Present wheat and coarse grains	Prescribed wheat and coarse grains
Bancroft	50	41.5	51.5	42.5	54	45	53	43.5	55	47	59	51
St. Anthony	52	44	52	48	56	45.5	55	44	57	47.5	61	52.5
Twin Falls	45	34.5	52	45.5	59	39	48	37.5	50	41.5	54	46
Caldwell	55.5	42.5	56.5	49.5	59.5	47.5	58.5	45.5	60.5	49	64.5	53.5
Cambridge	71.5	45	71.5	51.5	65.5	50	64.5	48.5	76.5	51.5	80.5	56
Weiser	56.5	44	58	50.5	60.5	49	59.5	47.5	61.5	50.5	65.5	55
Pocatello	50	40.5	50	42.5	54	43	53	41.5	55	45	59	47.5
Montpelier	51.5	42.5	51.5	44	55.5	47	54.5	45	56.5	48	60.5	53
Mountain Home	54.5	47	54.5	48	58.5	50.5	57.5	49	59.5	51.5	63.5	56
American Falls	50	38	50	43	54	42.5	53	40.5	55	44.5	59	49
Utah common points	46	38	46	36.5	50	43	49	40.5	51	44	55	39.5

Southern Idaho and Utah to Arizona, New Mexico, and Needles, Calif.

To—	From Twin Falls		From Caldwell		From Pocatello		From Mountain Home		From Ogden, Utah	
	Present wheat and coarse grians	Prescribed wheat and coarse grains	Present wheat and coarse grains	Prescribed wheat and coarse grains	Present wheat and coarse grains	Prescribed wheat and coarse grains	Present wheat and coarse grains	Prescribed wheat and coarse grains	Present wheat and coarse grains	Prescribed wheat and coarse grains
Yuma	58.5	54.5	63	58.5	56.5	51	61	56.5	52.5	46
Maricopa	63.5	59	68	63.5	61.5	55.5	66	61	57.5	48.5
Tucson	65	61.5	69.5	66	63	58.5	67.5	64	59	54.5
Bowie	68.5	65.5	73	69.5	66.5	61.5	71	67	62.5	57.5
Kingman	60	52	64.5	56.5	58	48.5	62.5	54.5	54	43.5
Ash Fork	62.5	55.5	67	60	66.5	52	65	57.5	56.5	48
Phoenix	62.5	55.5	67	60	66.5	52	65	58	56.5	48.5
Flagstaff	63.5	57.5	68	62.5	61.5	54	66	59	57.5	49.5
Allantown	68.5	62.5	73	66.5	66.5	58.5	71	64	62.5	54.5
Prescott	63.5	57	68	61	61.5	53	66	58.5	57.5	49
Nogales	68.5	63.5	73	68.5	66.5	60.5	71	66	62.5	56.5
Holbrook	68.5	60	73	64.5	66.5	57	71	62.5	62.5	52.5
Douglas	68.5	65.5	73	70	66.5	61.5	71	68	62.5	58
Benson	68.5	63.5	73	68	66.5	60	71	65.5	62.5	55.5
Mesa	65	58.5	69.5	63	63	55	67.5	60.5	59	51
Bisbee	68.5	65.5	73	69.5	66.5	61.5	71	67	62.5	57.5
Williams	63.5	56.5	68	60.5	61.5	52.5	66	58.5	57.5	49
Needles, Calif	60	50	64.5	54.5	58	46.5	62.5	52.5	54	41.5
Lordsburg, N. Mex	71	66.5	75.5	69.5	69	61.5	73.5	67	65	59

Southern Idaho and Utah to Arizona, New Mexico, and Needles, Calif.

To—	From St. Anthony		From Bancroft		From American Falls		From Weiser	
	Present wheat and coarse grains	Prescribed wheat and coarse grains	Present wheat and coarse grains	Prescribed wheat and coarse grains	Present wheat and coarse grains	Prescribed wheat and coarse grains	Present wheat and coarse grains	Prescribed wheat and coarse grains
Yuma, Ariz	58.5	53	58	51	56.5	51.5	64.5	60
Maricopa, Ariz	63.5	58	63	55.5	61.5	56.5	69.5	65.5
Tucson, Ariz	65	61	64.5	58	63	58.5	71	68
Bowie, Ariz	68.5	64	68	61.5	66.5	62.5	74.5	71.5
Kingman, Ariz	60	51.5	59.5	48.5	58	49.5	66	58
Ash Fork, Ariz	62.5	54.5	62	52	60.5	52.5	68.5	61.5
Phoenix, Ariz	62.5	55	62	52	60.5	52.5	68.5	61
Flagstaff, Ariz	63.5	56.5	63	54	61.5	54.5	69.5	63.5
Allantown, Ariz	68.5	61	68	58.5	66.5	59	74.5	68
Prescott, Ariz	63.5	55.5	63	53	61.5	54	69.5	62.5
Nogales, Ariz	68.5	63	68	60	66.5	61	74.5	69.5
Holbrook, Ariz	68.5	59	68	57	66.5	57.5	74.5	66
Douglas, Ariz	68.5	64.5	68	61.5	66.5	63	74.5	71.5
Benson, Ariz	68.5	62.5	68	60	66.5	60.5	74.5	69
Mesa, Ariz	65	57.5	64.5	55	63	55.5	71	64.5
Bisbee, Ariz	68.5	64	68	61.5	66.5	62.5	74.5	71
Williams, Ariz	63.5	55.5	63	52.5	61.5	54	69.5	62.5
Needles, Calif	60	49.5	59.5	46.5	58	47	66	56.5
Lordsburg, N. Mex	71	66	70.5	63	69	64	77	72.5

Idaho and Utah to Louisiana Group 3, on and east of the Rock Island south through Ruston, Alexandria, and Eunice, including New Orleans [1]

	Present wheat and coarse grains	Prescribed wheat and coarse grains [2]		Present wheat and coarse grains	Prescribed wheat and coarse grains [2]
American Falls, Idaho	82	72	Twin Falls, Idaho	83	73
Mountain Home, Idaho	85	75	Caldwell, Idaho	86	76
Pocatello, Idaho	82	72	Cambridge, Idaho	98	79
Idaho Falls, Idaho	83	73	Ogden, Utah	79	69

[1] West of the line described 3 cents less.
[2] Combination of proportional rate of 26 cents from Denver to Kansas City, proportional of 26 cents from Kansas City to Louisiana Group 3, and arbitraries over Denver prescribed in the Ogden Grain Exchange case, 122 I. C. C. 691. Rates from other groups in Idaho and Utah to be differentially related to the prescribed rates according to the formula set forth in the Ogden Grain Exchange case. Points on the Gilmore & Pittsburgh Railroad shall not exceed those from the Butte, Mont., group.

Southern Idaho to Seattle

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Weiser	33	33	26	Bancroft	50	50	37
Mesa	47	47	28.5	Montpelier	50	50	39.5
Boise	38	38	29	Pocatello	47	47	36
Twin Falls	47	47	36	Idaho Falls	47	47	38
Burley	46	46	34.5	Pirie	48	48	38.5
Shoshone	45	45	33	Ashton	49	49	39.5
Fairfield	47	47	34.5	Tetonia	50	50	40.5
American Falls	47	47	36	Mackey	50	50	40

Iowa to Chicago

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Storm Lake	23	20.5	23	Clarinda	22.5	20.5	23
Fort Dodge	21	19	21	Mason City	20.5	20.5	20
Hawarden	26.5	24	25	Centerville	20.5	18.5	19
Estherville	23	20.5	24	Red Oak	23	20.5	23
Sheldon	24.5	22	24	Creston	22.5	20.5	21.5
Waterloo	19.5	17.5	18	De Witt	17	15.5	13.5
Algona	21.5	19.5	22	Chariton	20.5	18.5	19.5
Marshalltown	19.5	17.5	18	Stanwood	18	16	14.5
Indianola	20.5	18	20.5	Rock Rapids	26.5	23	26
Cedar Rapids	19.5	17.5	16	Stockton	14.5	13	15
Shenandoah	24	21.5	24	Low Moor	14.5	13	13
Calmar	20.5	18.5	18	Des Moines	20.5	18.5	20.5

Iowa to Minneapolis

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Storm Lake	18	16	16	Waterloo	17.5	15.5	16
Sheldon	17	15.5	15.5	Cedar Rapids	19	17	17.5
Clarinda	23	20.5	24	Muscatine	19.5	17.5	19.5
Fort Dodge	17	15.5	15.5	Calmar	18	16	14
Creston	23	20.5	24.5	Sac City	21.5	19.5	19.5
Charlton	21.5	19.5	19	Spencer	17	15.5	14.5
Algona	17	15.5	14	Carroll	20.5	18.5	17.5
Mason City	15.5	14	13	Estherville	16.5	15	13.5
Iowa Falls	17.5	15.5	15	Sioux City (local)	21	19	18
Marshalltown	18	16	16.5				

Iowa to Omaha

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Manning	13.5	9.5	9	Clarinda	10	9	9
Storm Lake	15.5	14	14	Centerville	16.5	15	15.5
Fort Dodge	13.5	12	13	Creston	12	11	11
Cherokee	16.5	15	15.5	Charlton	14.5	13	13.5
Sheldon	14.5	13	14.5	Rock Rapids	18	16	20.5
Algona	16.5	15	15	Boone	14	12.5	13
Hawarden	13.5	12	13	Merrill	13.5	12	13
Luverne	16.5	15	16	Onawa	19	17	17.5
Shenandoah	9.5	8.5	8				

Iowa to Kansas City

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Storm Lake	24	21.5	20	Shenandoah	16.5	15	14
Fort Dodge	21.5	19.5	19	Clarinda	17	15.5	13.5
Cherokee	24.5	22	21.5	Centerville	16.5	15	15.5
Sheldon	22.5	20.5	20.5	Creston	16.5	15	14
Algona	24.5	22	21	Charlton	16.5	15	15.5
Indianola	16.5	15	16.5				

Iowa to St. Louis

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Storm Lake	25	22.5	24	Shenandoah	22.5	20.5	22
Fort Dodge	23	20.5	23	Cedar Rapids	21.5	19.5	19
Dixon	19.5	17.5	17.5	Clarinda	22	20	21
Iowa City	20	18	18	Waterloo	21.5	19.5	20.5
Sheldon	26.5	24	26	Centerville	19.5	17.5	18.5
Ames	22.5	20.5	21	Webster	21.5	19.5	19
Algona	24.5	22	23	Creston	22	20	20.5
Ruthven	25	22.5	24	Charlton	19.5	17.5	19
Indianola	20.5	18.5	20	Rock Rapids	27.5	24.5	26
Waverly	22.5	20.5	21	Marshalltown	21.5	19.5	20.5

Iowa to Texas Group 3, including Galveston and Houston

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Storm Lake	54.5	49	41.5	Shenandoah	47	42.5	35
Fort Dodge	52	47	40.5	Clarinda	47.5	43	34.5
Cherokee	55	49.5	42.5	Centerville	47	42.5	36.5
Sheldon	53	48	42	Creston	47	42.5	35
Algona	55	49.5	40.5	Chariton	47	42.5	36.5
Indianola	47	42.5	37.5				

Kansas to Chicago

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Olathe	27	24.5	24	Great Bend	37	33.5	32
Ottawa	29.5	26.5	25.5	Kinsley	37	33.5	32
Fort Scott	29.5	26.5	26	Dodge City	38	34.5	33
Oswego	31	28	28	Wakeeney	37.5	34	33
Eureka	34.5	31.5	28.5	Satanta	38.5	35	33
Wichita	35.5	32.5	30	Grainfield	38	34.5	33
Beloit	35.5	32.5	30	Syracuse	38	34.5	37
Salina	35.5	32.5	30	Goodland	38	34.5	37
Concordia	35	32	30	Elkhart	39	35.5	37
Hutchinson	36.5	33.5	31	Kansas City (local)	23.5	21	24
Ellsworth	36.5	33.5	31				

Kansas to Kansas City

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Olathe	9.5	8.5	7	Ellsworth	19	17	16
Ottawa	12	11	8.5	Great Bend	19.5	17.5	17
Fort Scott	12	11	11	Kinsley	19.5	17.5	17
Oswego	13.5	11.5	13	Dodge City	20.5	18.5	18
Eureka	17	15.5	13.5	Wakeeney	20	18	18
Wichita	18	16	15	Satanta	21	19	18
Beloit	18	16	15	Grainfield	20.5	18.5	18
Salina	18	16	15	Syracuse	20.5	18.5	22
Concordia	17.5	15.5	15	Goodland	20.5	18.5	22
Hutchinson	19	17	16	Elkhart	21.5	19.5	22

Kansas to Texas Group 3, including Galveston and Houston

	Present domestic		Present export		Prescribed wheat and coarse grains
	Wheat	Coarse grains	Wheat	Coarse grains	
Wichita	46	41.5	37	33.5	33
Syracuse	51.5	46.5	40.5	36.5	43
Beloit	51	46	40.5	36.5	36
Goodland	54	48.5	44	39.5	43
Salina	48	43	38	34.5	36
Dodge City	48	43	40	36	39.5
Great Bend	48	43	38	34.5	38
Hutchinson	46	41.5	37.5	34	37
Kinsley	48	43	39	35.5	38
Liberal	50	45	44	39.5	41
Tribune	51.5	46.5	39	35.5	43
Stafford	48	43	38	34.5	38
Kingman	46	41.5	37.5	34	37
Newton	46	41.5	37	33.5	36
Colby	53.5	48	44	39.5	41
Concordia	51	46	40	36	36
Wakeeney	52.5	47.5	43.5	39	39.5
Oakley	53	47.5	44	39.5	41
Lenora	53	47.5	42	38	38
Kansas City (local)	48	43			35

Kansas to Louisiana Group 3, on and east of the Rock Island, south through Ruston, Alexandria, and Eunice, including New Orleans[1]

	Present domestic		Present export		Prescribed domestic, wheat and coarse grains
	Wheat	Coarse grains	Wheat	Coarse grains	
Wichita	48	43	38	34.5	38
Syracuse	54.5	49	40.5	36.5	48
Beloit	51	46	40.5	36.5	41
Goodland	54	48.5	44	39.5	48
Salina	48	43	38	34.5	41
Dodge City	52	47	40	36	44.5
Great Bend	50	45	38	34.5	43
Hutchinson	50	45	37.5	34	42
Kinsley	50	45	39	35.5	43
Liberal	52	47	44	39.5	46
Tribune	53	47.5	39	35.5	48
Stafford	50	45	38	34.5	43
Kingman	50	45	38.5	35	42
Newton	48	43	37	33.5	41
Colby	53.5	48	44	39.5	46
Concordia	51	46	40	36	41
Wakeeney	52.5	47.5	43.5	39	44.5
Oakley	53	47.5	44	39.5	46
Lenora	53	47.5	42	38	43
Kansas City (local)	48	43			40

[1] West of above-described line, 3 cents less.

Minnesota to Chicago

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Albert Lea	22.5	20.5	21	Miloma	24	21.5	25
Appleton	26	23.5	24	New Ulm	25	22.5	21.5
Breckenridge	27	24.5	26.5	Ortonville	26.5	24	25
Crookston	29	26	29	Paynesville	24	21.5	21.5
Evansville	26	23.5	24	Pipestone	25.5	23	25
Fairmont	22.5	20.5	24	Red Wing	22.5	20.5	21
Faribault	22.5	20.5	21.5	Rochester	21	19	19.5
Fergus Falls	26.5	24	25	Sauk Center	25	22.5	22.5
Glenwood	25.5	23	24	Staples	25.5	23	24
Glyndon	27.5	24.5	27	Tintah	26.5	24	25.5
Granite Falls	25.5	23	24	Willmar	24	21.5	22
Hanley Falls	25.5	23	24	Winona	18	16	18.5
Laverne	25.5	23	25	Winnebago	22.5	20.5	22
Mankato	22.5	20.5	21	Worthington	24.5	22	25
Marshall	26	23.5	25	Minneapolis	22.5	20.5	22

Minnesota to Minneapolis

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Albert Lea	12	11	11	Miloma	13	11.5	14
Appleton	13.5	12	13	New Ulm	11	10	10.5
Breckenridge	14	12.5	16.5	Ortonville	13.5	12	14
Crookston	16	14.5	15	Paynesville	10.5	9.5	10.5
Evansville	13	11.5	13	Pipestone	14	12.5	15
Fairmont	12.5	11.5	13	Red Wing	7.5	6.5	7.5
Faribault	8	7	8	Rochester	12	11	11.5
Fergus Falls	13.5	12	14	Sauk Center	12	11	11.5
Glenwood	12.5	11.5	13	Staples	12.5	11.5	13
Glyndon	14.5	13	16	Tintah	13.5	12	14.5
Granite Falls	12.5	11.5	13	Willmar	11	10	11
Hanley Falls	12.5	11.5	13	Winona	12	11	11.5
Laverne	14	12.5	15.5	Winnebago	12.5	11.5	12
Mankato	10.5	9.5	10	Worthington	13.5	12	14
Marshall	13	11.5	14				

Minnesota to Duluth

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Albert Lea	18.5	18.5	18.5	Miloma	19.5	17.5	18
Appleton	18.5	14	17.5	New Ulm	17.5	18.5	18.5
Breckenridge	14.5	13	16.5	Ortonville	20	18	18.5
Crookston	16	14.5	17.5	Paynesville	18.5	14	18.5
Evansville	14	12.5	18.5	Pipestone	19	17	18.5
Fairmont	18.5	17.5	18	Red Wing	14	12.5	15
Faribault	14.5	13	18.5	Rochester	18.5	18.5	18
Fergus Falls	14	12.5	18.5	Sauk Center	14	12.5	14.5
Glenwood	16	12.5	18.5	Staples	13	11.5	13
Glyndon	18.5	14	18.5	Tintah	18.5	14	19
Granite Falls	17	18.5	18.5	Willmar	16	14.5	18.5
Hanley Falls	17	18.5	17.5	Winona	18.5	18.5	18
Laverne	20.5	18.5	20	Winnebago	19	17	18.5
Mankato	17	18.5	18	Worthington	20	18	18.5
Marshall	17.5	16.5	18				

Western and northern Missouri to Chicago

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Carrollton	21	19	21	Higginsville	22	20	22
Centralia	19.5	17.5	19.5	Macon	20	18	19.5
Chillicothe	20.5	18.5	21.5	Marshall	21.5	19.5	21.5
Clark	19.5	17.5	20	Martinsburg	18	16	21
Columbia	20.5	18.5	23	Maryville	23.5	21	20.5
Conception	23.5	21	24	Milan	20.5	18.5	23.5
Darlington	23.5	21	23	Plattsburg	21.5	19.5	20
Francis	18	16	19	St. Charles	18	16	19
Gallatin	21.5	19.5	23	Trenton	20.5	18.5	21
Glasgow	21	19	21	Wellsville	18	16	21
Higbee	19.5	17.5	20.5	Kansas City (local)	23.5	21	24

Western Missouri to Kansas City

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Albany	14	12.5	11.5	Milan	16.5	15	13
Bethany	15.5	14	12	Neosho	14.5	13	14.5
Carrollton	11	10	9	Nevada	12	11	11.5
Carthage	14.5	13	13.5	Ozark	17.5	15.5	15.5
Chillicothe	12	11	10.5	Platte City	7.5	6.5	7.5
Clinton	12	11	10.5	Plattsburg	9	8	7.5
Galena	14.5	13	16	Sedalia	13.5	12	11
Grant City	14	12.5	12	Springfield	14.5	13	14.5
Greenfield	14.5	13	13.5	Trenton	14	12.5	11.5
Harrisonville	9.5	8.5	8	Unionville	16.5	15	13.5
Higginsville	10.5	9.5	8.5	Warrensburg	11	10	9
Marshall	12.5	11.5	10.5	Warsaw	14.5	13	13
Marysville	14	12.5	11				

Western and northern Missouri to St. Louis

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Carrollton	17	15.5	16	Higginsville	18	16	16.5
Centralia	15.5	14	12	Macon	16	14.5	14
Chillicothe	16.5	15	16	Marshall	17.5	15.5	15.5
Clark	15.5	14	13	Martinsburg	13.5	12	11
Columbia	16.5	15	13	Maryville	19.5	17	19
Conception	19.5	17.5	19	Milan	16.5	15	16.5
Darlington	19.5	17.5	18	Plattsburg	17.5	15.5	20
Francis	14	12.5	12	St. Charles	7.5	6.5	7
Gallatin	17.5	15.5	16.5	Trenton	16.5	15	17.5
Glasgow	17	15.5	14.5	Wellsville	13.5	12	11
Higbee	15.5	14	16				

Missouri to Louisiana Group 3, including New Orleans

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
St. Louis (local)	36	32.5	[1] 33	Carthage	44.5	40	[2] 36
Boonville	44.5	40	[2] 40	Springfield	43	38.5	[2] 36
Silkeston	33	30.5	[1] 30	Kansas City (local)	47	42.5	[2] 40

[1] West of the Rock Island from Randolph, south through Ruston, Alexandria, and Eunice 4 cents higher except from stations referenced otherwise.
[2] Will be 3 cents less.

Missouri to Texas Group 3, including Houston and Galveston

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
St. Louis (local)	49	44	37	Carthage	46	41.5	33
Boonville	49	44	37	Springfield	46	41.5	33
Silkeston	46	41.5	34	Kansas City (local)	48	43	35

From Missouri to Cairo, Ill

	Present wheat	Present coarse grains	Prescribed wheat and course grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Illmo	12	11	7.5	Melby	13.5	12.5	12
Delta	12	11	9	Poplar Bluff	15	13.5	12
White Water	15.5	14	9	Naylor	18	16.5	13
Lutesville	16	14.5	9	Ironton	20	18	13
Ardacia	13.5	12.5	9	Summitt	20	18	13
Jackson	14.5	13	9	Farrensburg	13.5	12.5	13
Marquand	18	16.5	11	Doniphan	18	16.5	14
Dexter	13.5	12.5	11	Anniston	13.5	12.5	14
Silkeston	13.5	12.5	12	Blackwell	20	18	14
Bernie	13.5	12.5	12	Birds Point	15	13.5	15
Belmont	13.5	12.5	12	Riverside	20	18	15.5
Omeara	20	18	12	Koch	20	18	15.5

From southeastern Missouri to St. Louis

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Illmo	16	14.5	13	Melby	16	14.5	15.5
Delta	16	14.5	14	Poplar Bluff	16	14.5	15.5
Caney Creek	16	14.5	14.5	Naylor	16	14.5	16.5
Lutesville	15.5	14	14	Ironton	12.5	11.5	12
Ardacia	16	14.5	15	Summitt	11	10	10
Jackson	16	14.5	15.5	Farrensburg	16	14.5	17
Marquand	14.5	13	13	Doniphan	16	14.5	16.5
Dexter	16	14.5	15.5	Anniston	16	14.5	16
Silkeston	16	14.5	16	Blackwell	12.5	11	9
Bernie	16	14.5	16	Birds Point	16	14.5	13
Belmont	16	14.5	16	Riverside	8	7	7.5
Omeara	15.5	14	12	Koch	7.5	7	6.5

From southeastern Missouri to Memphis, Tenn.

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Illmo	16	14.5	16.5	Melby	16	14.5	14
Delta	16	14.5	16.5	Poplar Bluff	16	14.5	15
Caney Creek	16	14.5	17	Naylor	16	14.5	14.5
Lutesville	19	17	17	Ironton	19	17	18
Ardeola	16	14.5	15.5	Summitt	19	17	18.5
Jackson	16	14.5	17	Farrensburg	16	14.5	15.5
Marquand	19	17	18	Doniphan	16	14.5	15.5
Dexter	16	14.5	15.5	Anniston	16	14.5	15.5
Sikeston	16	14.5	16	Blackwell	19	17	20
Bernie	16	14.5	14	Birds Point	16	14.5	16
Belmont	16	14.5	17	Riverside	19	17	20.5
Omears	19	17	18.5				

Montana to Chicago

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Billings	52.5	51	48	Judith Gap	55	53.5	51
Bozeman	55	53.5	52	Kalispell	61	59.5	57
Culbertson	43	41.5	41	Laurel	53.5	52	48.5
Cut Bank	57.5	56	53	Lewistown	56	53.5	51.5
Forsyth	49	47.5	45	Livingston	55	53.5	51.5
Glasgow	48	46.5	45	Missoula	61	59.5	57.5
Great Falls	55	53.5	52.5	Ringling	61	59.5	51.5
Hardin	62	60.5	49.5	Shelby	56	54.5	52
Harlowton	55	53.5	49.5	Terry	45.5	44	42.5
Havre	52.5	51	49	Yates	44	42.5	40.5
Helena	57.5	56	54.5	Ryegate	53.5	52	49

Montana to Minneapolis-Duluth

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Billings	39.5	39.5	37	Judith Gap	42	42	40
Bozeman	42	42	41	Kalispell	48	48	46
Culbertson	30	30	30	Laurel	40.5	40.5	37.5
Cut Bank	44.5	44.5	42	Lewistown	42	42	40.5
Forsyth	36	36	34	Livingston	42	42	40.5
Glasgow	35	35	34	Missoula	48	48	46.5
Great Falls	42	42	41.5	Ringling	48	48	40.5
Hardin	40	40	38.5	Shelby	43	43	41
Harlowton	42	42	38.5	Terry	32.5	32.5	31.5
Havre	39.5	39.5	38	Yates	31	31	29.5
Helena	44.5	44.5	43.5	Ryegate	42	42	38

Montana to Seattle

	Present domestic		Present export		Prescribed wheat and coarse grains
	Wheat	Coarse grains	Wheat	Coarse grains	
Billings	40.5	36.5	33.5	30	38
Bozeman	38.5	34.5	31.5	28.5	34
Culbertson	46	41.5			45
Cut Bank	38.5	34.5	32	29	34
Forsythe	45.5	41			41
Glasgow	45	40.5			42
Great Falls	39	35	32	29	34
Hardin	44.5	40			40.5
Harlowton	39	35	32	29	37
Havre	38.5	34.5	32	29	37.5
Helena	38.5	34.5	31.5	28.5	31.5
Judith Gap	39	35	32	29	37.5
Kalispell	35	31.5	32	29	30
Laurel	40.5	36.5	33.5	30	37.5
Lewistown	39	35	32	29	38.5
Livingston	39	35	32	29	34.5
Missoula	36	32.5	30	26	27
Ringling	39	35	32	29	35
Shelby	38.5	34.5	32	29	34.5
Terry	52	47			40.5
Three Forks	57.5	51.5			49.5
Wolf Creek	40.5	36.5			34

Nebraska to Chicago

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Lincoln	28.5	25.5	26	Fremont	27	24.5	26
Fairmont	34.5	31.5	26.5	Schuyler	38.5	27.5	28
Harvard	36.5	33.5	28	Columbus	33	29.5	25.5
Hastings	37	33.5	28.5	Alliance	43	38.5	37
Minden	37	33.5	29.5	Central City	36.5	33.5	27
Holdredge	37	33.5	30.5	Norfolk	34	31	27
Cambridge	39	35.5	32	Albion	36.5	33.5	27
Culbertson	39	35.5	33.5	Spaulding	37	33.5	28
Salem	31.5	28.5	26.5	Palmer	37	33.5	29
Blue Hill	37	33.5	29	Greeley Center	37	33.5	29.5
Wilcox	37	33.5	30	Grand Island	37	33.5	28
Curtis	39	35.5	33	Kearney	37	33.5	29.5
Venango	39	35.5	35.5	Ravenna	37	33.5	29
Superior	37	33.5	29	North Platte	39	35	33
Tecumseh	33	29.5	26.5	Omaha (local)	23.5	21	24

Nebraska to Omaha

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Lincoln	11	10	8.5	Fremont	9.5	8.5	8.5
Fairmont	17	15.5	11.5	Schuyler	13	11.5	9
Harvard	19	17	13	Columbus	15.5	14	10.5
Hastings	19.5	17.5	13.5	Alliance	23.5	23	23
Minden	19.5	17.5	14.5	Central City	19	17	12
Holdredge	19.5	17.5	15.5	Norfolk	16.5	15	12
Cambridge	21.5	19.5	17	Albion	19	17	12
Culbertson	21.5	19.5	15.5	Spaulding	19.5	17.5	13
Salem	14	12.5	11.5	Palmer	19.5	17.5	14
Blue Hill	19.5	17.5	14	Greeley Center	19.5	17.5	14.5
Wilcox	19.5	17.5	15	Grand Island	19.5	17.5	12
Curtis	21.5	19.5	15	Kearney	19.5	17.5	14.5
Venango	21.5	19.5	20.5	Ravenna	19.5	17.5	14
Superior	19.5	17.5	14	North Platte	21.5	19.5	15
Tecumseh	15.5	14	11.5				

Nebraska to Kansas City

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Lincoln	17	15.5	14.5	Tecumseh	16.5	15	13
Fairmont	20	18	16.5	Fremont	17.5	15.5	14.5
Harvard	20.5	18.5	17.5	Schuyler	21	19	15
Hastings	20.5	18.5	18.5	Columbus	21.5	19.5	16.5
Minden	21.5	19.5	19	Central City	23.5	21	18
Holdredge	21.5	19.5	19.5	Norfolk	23	20.5	18
Cambridge	21.5	19.5	21	Albion	25.5	23	18
Culbertson	23	20.5	22	Spaulding	26	23.5	19
Salem	13.5	12	12	Palmer	25.5	23	20
Blue Hill	20.5	18.5	18	Greeley Center	26	23.5	20.5
Wilcox	21.5	19.5	19.5	Grand Island	23.5	21	19
Curtis	25.5	23	23	Kearney	24	21.5	20.5
Venango	26.5	24	24.5	Ravenna	24	21.5	20
Superior	19.5	17.5	16	North Platte	28	21.5	24

Nebraska to Texas Group 3, including Houston and Galveston

	Present wheat	Present coarse grains	Prescribed wheat and course grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Hastings	57.5	51.5	39.5	Grand Island	60.5	54.5	40
Superior	56.5	51	37	Kearney	61	55	41.5
Blue Hill	57.5	51.5	39	Fairmont	57	51.5	37.5
Holdredge	58.5	52.5	40.5	Lincoln	51	46	36
Wilcox	58.5	52.5	40.5				

Nebraska to Louisiana Group 3, on and east of the Rock Island, south through Ruston, Alexandria, and Eunice, including New Orleans [1]

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains [2]		Present wheat	Present coarse grains	Prescribed wheat and coarse grains [2]
Hastings	57.5	51.5	44.5	Grand Island	60.5	54.5	45
Superior	56.5	51	42	Kearney	61	55	46.5
Blue Hill	57.5	51.5	44	Fairmont	57	51.5	42.5
Holdredge	58.5	52.5	45.5	Lincoln	51	46	41
Wilcox	60.5	54.5	45.5				

[1] West of the line described, 3 cents less.
[2] Combination on Kansas City from south of the Union Pacific main line west from Omaha through Columbus and Grand Island and combination on both Omaha and Kansas City from, on, and north of that line.

North Dakota to Chicago

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Williston	40	36	38.5	Tuttle	36	32.5	33
Northgate	39.5	35.5	37	Pingree	33	29.5	31.5
Rugby	35.5	33	34	Carrington	33	29.5	31.5
Antler	35.5	32	36	Jamestown	33	29.5	30.5
Devils Lake	32.5	29.5	32	Esmond	35.5	32	34
Pembina	30.5	27.5	33	Hannah	32.5	29.5	33
Dunseith	35.5	32	37	Conway	31	28	31
Walhalla	30.5	27.5	32.5	Northwood	30.5	27.5	30
Grand Forks	29.5	26.5	30	Portland	30.5	27.5	29.5
Fargo	29.5	26.5	27.5	Grafton	30.5	27.5	31
Killdeer	44	39.5	38	Sanborn	33	29.5	30
Turtle Lake	38.5	34.5	35	Marion	33.5	30	30.5
Beach	44	39.5	39	Casselton	30.5	27.5	28
Scoria	42.5	38.5	38	Milnor	32.5	29.5	28.5
Dickinson	41	37	37	Sharon	32.5	29.5	30
Hebron	39.5	35.5	36	Neche	30.5	27.5	32
Sykeston	33.5	30	32				

North Dakota to Minneapolis-Duluth

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Williston	27	24.5	27.5	Tuttle	23	20.5	22
Northgate	26.5	24	26	Pingree	20	18	20.5
Rugby	22.5	20.5	23	Carrington	20	18	20.5
Antler	22.5	20.5	25	Jamestown	20	18	19.5
Devils Lake	19.5	17.5	21	Esmond	22.5	20.5	23
Pembina	17.5	15.5	22	Hannah	19.5	17.5	22
Dunseith	22.5	20.5	26	Conway	18	16	20
Walhalla	17.5	15.5	21.5	Northwood	17.5	15.5	19
Grand Forks	16.5	15	19	Portland	17.5	15.5	18.5
Fargo	16.5	15	16.5	Grafton	17.5	15.5	20
Killdeer	31	28	27	Sanborn	20	18	19
Turtle Lake	26.5	23	24	Marion	20.5	18.5	19.5
Beach	31	28	28	Casselton	17.5	15.5	17
Scoria	29.5	26.5	27	Milnor	19.5	17.5	17.5
Dickinson	28	25	26	Sharon	19.5	17.5	19
Hebron	26.5	24	25	Neche	17.5	15.5	21
Sykeston	20.5	18.5	21				

Oklahoma to Chicago

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Altus	43	38.5	38	Hooker	43	38.5	36
Alva	38	34	34	Hobart	41.5	37.5	37
Anadarko	41	37	35	Hugo	40	36	37
Antlers	38.5	34.5	35	Kingfisher	40	36	34.5
Ardmore	44.5	40	36	Lawton	43	38.5	36
Arapaho	41.5	37.5	36	Mangum	43	38.5	38
Buffalo	42	38	36	Medford	36.5	33	33
Camargo	43	38.5	37	Muskogee	37	33.5	32
Cherokee	38	34	33.5	Newkirk	36.5	33	32
Cheyenne	43.5	39	37	Norman	44	39.5	34
Chickasha	40.5	36.5	35	Oklahoma City	40	36	34
Cordell	41.5	37.5	37	Purcell	44.5	40	35
Durant	40	36	36.5	Perry	38.5	34.5	34
El Reno	40	36	34	Watonga	40	36	35
Enid	38.5	34.5	33	Woodward	43	38.5	35
Fairview	40	36	34.5	Sayre	43.5	39	38
Forgan	45	40.5	38	Shattuck	45	40.5	36.5
Guthrie	40	36	34.5	Tulsa	36	32.5	30.5
Guymon	43.5	39	37.5	Vinita	34.5	31	29

Oklahoma to Kansas City

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Altus	35.5	32	23	Hobart	34	30.5	22
Alva	22.5	20.5	19	Hooker	27	24.5	21
Anadarko	32.5	29.5	20	Hugo	33	29.5	23
Antlers	33	29.5	21	Kingfisher	28	26	19.5
Ardmore	36.5	33	21	Lawton	33	29.5	21
Arapaho	33	29.5	21	Mangum	35.5	32	23
Buffalo	26	23.5	21	Medford	20	18	18
Camargo	36	32.5	22	Muskogee	25.5	23	17
Cherokee	22.5	20.5	18.5	Newkirk	20	18	17
Cheyenne	36	32.5	22	Norman	31	28	19
Chickasha	31	28	20	Oklahoma City	29.5	26.5	19
Cordell	34	30.5	22	Purcell	31	28	20
Durant	36.5	33	21.5	Perry	23.5	21	19
El Reno	29.5	26.5	19	Watonga	29	26	20
Enid	23.5	21	18	Woodward	28	25	20
Fairview	26.5	24	19.5	Sayre	35.5	32	23
Forgan	29	26	23	Shattuck	29	26	21.5
Guthrie	25	25	19.5	Tulsa	22.5	20.5	14.5
Guymon	29	26	22.5	Vinita	19.5	17.5	14.5

Oklahoma to St. Louis

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Altus	38	34	33	Hobart	37.5	33.5	31
Alva	34	30.5	28	Hooker	40	36	30
Anadarko	37	33.5	30	Hugo	34.5	31	28.5
Antlers	33	29.5	28.5	Kingfisher	35	31.5	28.5
Ardmore	38	34	30	Lawton	37	33.5	30
Arapaho	36	32.5	30	Mangum	38	34	32
Buffalo	37	33.5	30	Medford	32.5	29.5	27
Camargo	38	34	31	Muskogee	32	29	28.5
Cherokee	34	30.5	27.5	Newkirk	32.5	29.5	26
Cheyenne	38	34	31	Norman	37	33.5	28
Chickasha	36.5	33	30	Oklahoma City	36	32.5	28
Cordell	37.5	33.5	31	Purcell	37	33.5	29
Durant	36	32.5	27.5	Perry	34.5	31	28
El Reno	36	32.5	28	Watonga	36	32.5	29
Enid	34.5	31	27	Woodward	37	33.5	29
Fairview	36	32.5	28.5	Sayre	38	31	32
Forgan	39	35	32	Shattuck	38	34	30.5
Guthrie	35	31.5	28.5	Tulsa	30	27	23.5
Guymon	42.5	38.5	31.5	Vinita	29	26	20.5

Oklahoma to Texas Group 3, including Galveston and Houston

	Present wheat [1]	Present coarse grains [1]	Prescribed wheat and coarse grains		Present wheat [1]	Present coarse grains [1]	Prescribed wheat and coarse grains
Altus	32	29	26.5	Hobart	34	30.5	27
Alva	36	32.5	31	Hooker	38	34	37
Anadarko	33	29.5	26.5	Hugo	30	27	23.5
Antlers	31	28	24	Kingfisher	34	30.5	27.5
Ardmore	30	27	23	Lawton	31	28	25
Arapaho	35	31.5	28	Mangum	33	29.5	27
Buffalo	38	34	33	Medford	36	32.5	29.5
Camargo	36	32.5	29.5	Muskogee	34	30.5	27.5
Cherokee	36	32.5	30.5	Newkirk	36	32.5	30.5
Cheyenne	36	32.5	31	Norman	32	29	26
Chickasha	32	29	26	Oklahoma City	33	29.5	26.5
Cordell	34	30.5	27.5	Purcell	32	29	26
Durant	29	26	22.5	Perry	35	31.5	28.5
El Reno	33	29.5	26.5	Watonga	35	31.5	28
Enid	35	31.5	29	Woodward	36	32.5	31
Fairview	36	32.5	31	Sayre	36	32.5	30.5
Forgan	38	34	34	Shattuck	38	34	34
Guthrie	34	30.5	27.5	Tulsa	35	31.5	29
Guymon	37	33.5	36	Vinita	35	31.5	29

[1] Export rates to Galveston; domestic rates are from 1 to 2 cents higher.

Oklahoma to Memphis

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Alva	31.5	28.5	31.5	Hugo	31.5	28.5	28
Anadarko	31.5	28.5	29	Kingfisher	31.5	28.5	28
Antlers	36.5	33	23.5	Lawton	31.5	28.5	29.5
Ardmore	34.5	31	28.5	Mangum	31.5	28.5	32
Arapaho	31.5	28.5	29.5	Medford	31.5	28.5	31
Buffalo	47	42.5	33	Muskogee	31.5	28.5	23
Camargo	31.5	28.5	32.5	Newkirk	38	34	29.5
Cherokee	34.5	31	31	Norman	31.5	28.5	27.5
Cheyenne	37	33.5	31.5	Oklahoma City	31.5	28.5	28.5
Chickasha	31.5	28.5	28	Purcell	35.5	32	29.5
Cordell	31.5	28.5	30.5	Perry	31.5	28.5	29
Durant	34.5	31	25	Watonga	31.5	28.5	28
El Reno	31.5	28.5	27.5	Woodward	43.5	39	33.5
Enid	31.5	28.5	29	Sayre	31.5	28	31.5
Fairview	31.5	28.5	31	Shattuck	44	39.5	34
Guthrie	31.5	28.5	27.5	Tulsa	31.5	28	25.5
Hobart	31.5	28.5	31	Vinita	29.5	26.5	24

Oklahoma to Louisiana Group 3, on and east of the Rock Island south from Randolph through Ruston, Alexandria, and Eunice [1]

	Present wheat [2]	Present coarse grains [2]	Prescribed wheat and coarse grains		Present wheat [2]	Present coarse grains [2]	Prescribed wheat and coarse grains
Alva	45	40.5	36.5	Hugo	32	29	24
Anadarko	40	36	31.5	Kingfisher	41	37	33
Ardmore	36	33	27.5	Lawton	38	34.5	30.5
Arapaho	43	38.5	34.5	Mangum	41	37	32.5
Buffalo	48	43	39	Medford	44	39.5	35
Camargo	44	39.5	36	Muskogee	37	33.5	29
Cherokee	44	39.5	36	Newkirk	43	38.5	34.5
Cheyenne	45	40.5	36.5	Norman	38	34.5	30.5
Chickasha	40	36	31.5	Oklahoma City	39	35.5	31
Cordell	43	38.5	34	Purcell	38	34.5	29.5
Durant	34	31	26	Perry	41	37	33
El Reno	40	36	32.5	Watonga	42	38	34
Enid	43	38.5	34	Woodward	45	40.5	37
Fairview	45	40.5	37	Sayre	43	38.5	36
Forgan	48	43	39	Shattuck	46	41.5	39
Guthrie	40	36	32	Tulsa	39	35.5	31
Hobart	42	38	33	Vinita	39	35.5	31

[1] West of that line, 3 cents less; export rates to New Orleans are from 1 to 3 cents higher than to Galveston from west of the Santa Fe line south from Arkansas City through Oklahoma City to Texas State line.

[2] Averages to Eunice, Lafayette, and New Orleans.

Washington and Oregon, south of Snake River, to Seattle

	Present wheat and coarse grains	Prescribed wheat and coarse grains		Present wheat and coarse grains	Prescribed wheat and coarse grains
Ayer, Wash	21	20	Ash, Wash	20.5	19.5
Starbuck, Wash	21	20	Page, Wash	20.5	19.5
Pleasant View, Wash	21	20	Simmons, Wash	20.5	19.5
Ellwood, Wash	21	20	Wallula, Wash	20.5	19.5
Bolles, Wash	21	20	Touchet, Wash	20.5	19.5
Alto, Wash	21	20	Whitman, Wash	20.5	19.5
Dayton, Wash	21	20	Walla Walla, Wash	20.5	19.5
Pomeroy, Wash	25.5	20	Hadley, Wash	20.5	19.5
Turner, Wash	21	20	Athena, Oreg	20.5	19.5
Waitsburg, Wash	21	20	Blue Mountain, Oreg	20.5	19.5
Eureka, Wash	20.5	19.5	Spofford, Oreg	20.5	19.5
Blakeley, Wash	20.5	19.5	Pendleton, Oreg	20.5	19.
Attalia, Wash	20.5	19.5	Wayland, Oreg	20.5	

Washington and Oregon, south of Snake River, to Portland

	Present wheat and coarse grains	Prescribed wheat and coarse grains		Present wheat and coarse grains	Prescribed wheat and coarse grains
Ayer, Wash	19	18	Ash, Wash	18.5	17.5
Starbuck, Wash	19	18	Page, Wash	18.5	17.5
Pleasant View, Wash	19	18	Simmons, Wash	18.5	17.5
Ellwood, Wash	19	18	Wallula, Wash	18.5	17.5
Bolles, Wash	19	18	Touchet, Wash	18.5	17.5
Alto, Wash	19	18	Whitman, Wash	18.5	17.5
Dayton, Wash	19	18	Walla Walla, Wash	18.5	17.5
Pomeroy, Wash	23	18	Hadley, Wash	18.5	17.5
Turner, Wash	19	18	Athena, Oreg	18.5	17.5
Waitsburg, Wash	19	18	Blue Mountain, Oreg	18.5	17.5
Rulo, Wash	18.5	17.5	Sopofford, Oreg	18.5	17.5
Eureka, Wash	18.5	17.5	Pendleton, Oreg	18.5	17.5
Blakeley, Wash	18.5	17.5	Wayland, Oreg	18.5	17.5
Attalia, Wash	18.5	17.5			

Oregon, Washington Railroad & Navigation Company main and branch line points in Oregon, west and southeast of Pendleton and from Oregon Short Line Railroad points on the Burns and Homestead branches, to Portland

	Interstate, present wheat and coarse grains	Intrastate, present wheat and coarse grains	Interstate and intrastate, prescribed wheat and coarse grains		Interstate, present wheat and coarse grains	Intrastate, present wheat and coarse grains	Interstate and intrastate, prescribed wheat and coarse grains
Arlington	16.5	16.5	13	La Grande	25	25	20.5
Baker	26.5	26.5	22.5	Lexington	22	20	15
Bend	31	23.5	17.5	Maupin	20.5	23.5	14
Huntington	30		23.5	Mission	19.5	19.5	17.5
Cecil	21	19	14.5	Pilot Rock	25	22	17.5
Condon	22.5	20	16	Redmond	28.5	22.5	17.5
Crane	38		29	Reith	18.5	18.5	17.5
Elgin	27	26.5	21	Riverside	38	38	28
Enterprise	31.5	29	23	Shaniko	22.5	19.5	14.5
Gateway	24	20.5	15.5	Speece	22	19.5	14.5
Grass Valley	21.5	18	13.5	The Dalles	10.5	10.5	11
Harper	36		26.5	Thorn Hollow	20.5	20.5	17.5
Hepner	22.5	20.5	15.5	Umatilla	17.5	17.5	15
Hinkle	21.5	20	16	Wallowa	31.5	28.5	22.5
Homestead	32	33	26	Wasco	17	16.5	12.5
Joseph	31.5	29.5	23				

South Dakota to Chicago

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Yankton	29	26	24	Huron	34	31.5	29.5
Scotland	30	27	25.5	Redfield	34	31	31
Tyndall	31	28	25.5	Watertown	31	28	27
Sioux Falls	27.5	24.5	26	Faulkton	38	34.5	31
Parker	28	25	26	Aberdeen	34	31	29
Wagner	33	29.5	27	Roscoe	38	34.5	31
Salem	30	27	27	Pierre	41	37	34
Madison	29.5	26.5	28	Presho	40.5	36.5	34
Vilas	30	27	28	Stamford	42.5	38.5	36.5
Wentworth	29.5	26.5	28	Imlay	43.5	39	38.5
Mitchell	30.5	27.5	27	Rapid City	45.5	41	40
Platte	34	31	28	Faith	42.5	38.5	36.5
Plankinton	32.5	29.5	28.5	Isabel	39.5	35.5	34.5
Stickney	32.5	29.5	28	Van Metre	44.5	40	36.5
Tripp	30.5	27.5	26.5	Powell	46	41.5	38
Woonsocket	31.5	28.5	29	Underwood	49	44	40.5
Arlington	32.5	29.5	29	Bonesteel	36.5	32.5	29
Wolsey	34	31	30	Gregory	39	35	30.5
Chamberlain	34.5	31.5	30.5	Winner	40.5	36	31

South Dakota to Minneapolis

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Yankton	21	19	18.5	Wolsey	21	19	19
Scotland	23.5	21	20.5	Chamberlain	28	25	24
Tyndall	24.5	22	20.5	Huron	21	19	18
Sioux Falls	18.5	16.5	16.5	Redfield	21	19	19
Parker	20	18	18.5	Watertown	18	16	16
Wagner	26.5	24	21	Aberdeen	21	19	18
Salem	24	21.5	17.5	Roscoe	25	22.5	20
Madison	19	17	18	Pierre	28	25	23
Vilas	20	18	18.5	Presho	31.5	28.5	27.5
Wentworth	19	17	16.5	Stamford	33.5	30.5	29
Mitchell	21	19	19	Imlay	36	33	31.5
Faulkton	25	22.5	20	Rapid City	36	33	29.5
Platte	27.5	24.5	22	Faith	29.5	26.5	27.5
Plankinton	24	21.5	23	Isabel	26.5	24	26.5
Stickney	26	23.5	22	Van Metre	31.5	28.5	26
Tripp	24	21.5	20.5	Powell	33	29.5	27
Woonsocket	21	19	19	Underwood	35	32	29.5
Arlington	19.5	17.5	16.5				

South Dakota to Sioux City

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Yankton	12	11	11	Huron	18	16	14.5
Scotland	13.5	12	11	Redfield	20	18	16
Tyndall	13.5	12	11	Watertown	20	18	16
Sioux Falls	14	12.5	11	Faulkton	23	20.5	18.5
Parker	14.5	13	11	Aberdeen	22.5	20.5	17.5
Wagner	16	14.5	12	Pierre	25	22.5	19
Selbin	16	14.5	12	Reserve	23	20.5	18.5
Madison	16.5	15	12	Presho	24.5	22	18
Vilas	17	15.5	13	Stamford	28	25	21
Wentworth	16.5	15	13	Imlay	33.5	30.5	23
Mitchell	17	15.5	12	Rapid City	34.5	31.5	25
Platte	17	15.5	13	Faith	29.5	26.5	27
Plankinton	17.5	15.5	13.5	Isabel	27.5	24	25
Stickney	17.5	15.5	13	Van Metre	28.5	25.5	21.5
Tripp	15.5	14	12	Powell	31	28	23
Woonsocket	18	16	14	Underwood	34.5	31.5	25
Arlington	17.5	15.5	14	Bonesteel	19	17	14
Wolsey	18	16	15	Gregory	21.5	19.5	15.5
Chamberlain	19.5	17.5	15.5	Winner	23	20.5	16

Texas to Kansas City

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Amarillo	35	31.5	27	Lamesa	30	35	33
Benonine	33	30.5	26.5	Lubbock	28	34	31
Canyon	36	32.5	28	Memphis	35	32.5	29
Crosbyton	38	34	32	Panhandle	35	31.5	29.5
Dalhart	35	31.5	27	Plainview	37	33.5	29.5
Farwell	37	33.5	30	Stratford	33	30.5	24
Floydada	37	33.5	30	Texhoma	32	29	24
Fort Worth	31	29	29	Vernon	38	34	26.5
Higgins	30	27	23.5	Wichita Falls	37	33.5	24

Texas to Texas Group 5, including Galveston and Houston

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Amarillo	33	30.5	30.5	Lamesa	36	32.5	29
Benonine	33	30.5	30.5	Lubbock	33	30.5	28
Canyon	33	30.5	31	Memphis	33	30.5	27.5
Crosbyton	33	30.5	32	Panhandle	33	30.5	32.5
Dalhart	34	30.5	33	Plainview	33	30.5	29.5
Farwell	34	30.5	31	Stratford	35	31.5	34
Floydada	33	30.5	31	Texhoma	35	31.5	34
Fort Worth	34	31.5	30	Vernon	33	30.5	33
Higgins	33	30.5	34	Wichita Falls	33	30.5	33

From Texas to Memphis

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Abilene	37.5	34	35	Fort Worth	36.5	33	33.5
Amarillo	37.5	34	40	Higgins	45	40.5	34
Ballinger	37.5	34	34.5	Lamesa	50	45	40
Beeonine	37.5	34	32	Lubbock	46.5	42	40
Big Springs	37.5	34	35	Memphis	38	34.5	37.5
Canyon	37.5	34	40	Panhandle	43	38.5	40
Corsicana	36.5	33	37.5	Plainview	46.5	42	40
Crosbyton	46.5	42	40	Stratford	40	36	40
Dalhart	40	36	40	Texhoma	40	36	40
Farwell	46.5	42	40	Vernon	38	34.5	32
Floydada	46.5	42	40	Wichita Falls	38	34.5	31.5

Texas to Vicksburg, Miss.

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Abilene	37.5	34	30	Fort Worth	36.5	33	33.5
Amarillo	38	34.5	35	Higgins	45	40.5	35
Ballinger	37.5	34	29.5	Lamesa	50	45	35
Beeonine	49.5	44.5	32	Lubbock	46.5	42	35
Big Springs	37.5	34	33	Memphis	38	34.5	33.5
Canyon	49.5	44.5	35	Panhandle	43	38.5	35
Corsicana	36.5	33	22.5	Plainview	49.5	44.5	35
Crosbyton	46.5	42	35	Stratford	49.5	44.5	37
Dalhart	41.5	37.5	36	Texhoma	49.5	44.5	38
Farwell	46.5	42	35	Vernon	38	34.5	30
Floydada	46.5	42	35	Wichita Falls	38	34.5	27.5

Texas to Louisiana Group 5, including New Orleans

	Present wheat[1]	Present coarse grains[1]	Prescribed wheat and coarse grains		Present wheat[1]	Present coarse grains[1]	Prescribed wheat and coarse grains
Abilene	37.5	34	35	Fort Worth	36.5	33	33.5
Amarillo	38	34.5	40	Higgins	52.5	47.5	40
Ballinger	37.5	34	34.5	Lamesa	50	45	40
Beeonine	42	38	37	Lubbock	46.5	42	40
Big Springs	37.5	34	38	Memphis	38	34.5	37.5
Canyon	38	34.5	40	Panhandle	43	38.5	40
Corsicana	36.5	33	37.5	Plainview	47	42.5	40
Crosbyton	46.5	42	40	Stratford	52.5	47.5	42
Dalhart	41.5	37.5	40	Texhoma	52.5	47.5	42
Farwell	46.5	42	40	Vernon	37.5	34	34
Floydada	46.5	42	40	Wichita Falls	37.5	34	32.5

[1] Present rates to New Orleans.

Washington (Big Bend district) to Seattle

	Present wheat and coarse grains	Prescribed wheat and coarse grains		Present wheat and coarse grains	Prescribed wheat and coarse grains
Lyons	24	20	Ephrata	21.5	18
Espanola	24	20	Riparia	21.5	19.5
Bluestem	24	19.5	La Crosse	21.5	19.5
Downs	22	18.5	Farrington	21.5	19
Odessa	21.5	18	Cunningham	21.5	17.5
Wilson Creek	21.5	17.5	Winona	21.5	21
Adrian	21.5	16.5	Washtucna	21.5	18
Cheney	22	19.5	Pasco	17.5	17.5
Creskey	22	18.5	Connell	21.5	18
Emden	21.5	17.5	Bruce	21.5	19
Marengo	21.5	17.5	West Warden	21.5	17.5
Malden	24	19.5	Nagel	21.5	17
Lavista	22.5	20	Lamont	22	21
Revere	22.5	18	Amber	22	20.5
Ralston	21.5	18	Reardon	24	20
Lind	21.5	16.5	Davenport	24	19.5
Neppel	21.5	16.5	Creston	24	19
Ruff	21.5	16.5	Wilbur	24	18.5
Schoonover	21.5	17.5	Hanson	23	17.5
Marcellus	21.5	17.5	Coulee	23	17.5
Novarra	21.5	15.5	Omans	24	20

Washington (Big Bend district) to Portland

	Present wheat and coarse grains	Prescribed wheat and coarse grains		Present wheat and coarse grains	Prescribed wheat and coarse grains
Lyons	27.5	22.5	Ephrata	24.5	20.5
Espanola	27.5	23	Riparia	21.5	19.5
Bluestem	27.5	23	La Crosse	21.5	19.5
Downs	25	22	Farrington	21.5	18
Odessa	24.5	22	Cunningham	21.5	18.5
Wilson Creek	24.5	21	Winona	21.5	20
Adrian	22.5	20	Washtucna	21.5	18
Cheney	22	20	Pasco	17.5	17
Creskey	22	19	Connell	21.5	18
Emden	21.5	18.5	Bruce	21.5	19
Marengo	21.5	18.5	West Warden	21.5	19.5
Malden	28	21	Nagel	21.5	20
Lavista	28	20.5	Lamont	22	20.5
Revere	28	20	Amber	22	21
Ralston	27	19	Reardon	24	22.5
Lind	21.5	18	Davenport	24	23.5
Neppel	35.5	22.5	Creston	24	22.5
Ruff	35.5	23	Wilbur	24	22
Schoonover	35.5	23	Hanson	23	21.5
Marcellus	35.5	22.5	Coulee	23	21
Novarra	35	21.5	Omans	24	23.5

Wisconsin to Milwaukee

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Antigo	14.5	13	14	Marshfield	14.5	13	14.5
Appleton	11	10	11	Mercer	18	16	18
Cameron	18	16	18	Merrillan	14.5	13	15
Commonwealth	22.5	20.5	16.5	Rhinelander	17	15.5	16
Eau Claire	16.5	15	16.5	Sparta	14.5	13	14
Elroy	14	12.5	13.5	Three Lakes	17.5	16	16
Fond du Lac	11	10	9	Trego	18	16	19.5
Harrison	17	15.5	16	Turtle Lake	18	16	20
Janesville	12.5	11	10	Watertown	9.5	8.5	8.5
Kenosha	5	5	7.5	Waukesha	6.5	6.5	6
La Crosse	14.5	13	15.5	Wausau	14.5	13	14.5
Madison	12	12	10.5	Wisconsin Rapids	14.5	13	13.5
Manitowish	18	16	18				

Wisconsin to Chicago

	Present wheat	Present coarse grains	Prescribed wheat and coarse grains		Present wheat	Present coarse grains	Prescribed wheat and coarse grains
Antigo	18	16	17.5	Marshfield	18	16	17.5
Appleton	15.5	14	14.	Mercer	23	20.5	20.5
Cameron	18	16	20.5	Merrillan	18	16	18
Commonwealth	26	23.5	19.5	Rhinelander	21	19	19
Eau Claire	18	16	19	Sparta	18	16	16.5
Elroy	18	16	15.5	Three Lakes	22.5	20.5	19
Fond du Lac	15.5	14	13	Trego	18	18	21.5
Harrison	21	19	19	Turtle Lake	18	16	22
Janesville	12.5	12.5	11	Watertown	13	12.5	12
Kenosha	5	5	8.5	Waukesha	10	10	11
La Crosse	18	16	17.5	Wausau	18	16	17.5
Madison	16.5	15	12	Wisconsin Rapids	18	16	16.5
Manitowish	23	20.5	20.5				

Interior scales [1]

Miles	W. t. l.[2]	S.W. and P. Cst.[3]	Inter-mtn.[4]	Miles	W. t. l.[2]	S.W. and P. Cst.[3]	Inter-mtn.[4]
10	6	6.5	7	760	36	39.5	43.5
20	6.5	7.5	8.5	770	36	39.5	43.5
30	7.5	8.5	9.5	780	36.5	40	44
40	8	9	10	790	36.5	40	44
50	9	9.5	10.5	800	37	40.5	44.5
60	9	10.5	11.5	810	37.5	41	45
70	10	11	12	820	37.5	41	45
80	11	12	13	830	38	41.5	45.5
90	12	12.5	14	840	38	41.5	45.5
100	12	13.5	15	850	38.5	42.5	47
110	12.5	14	15.5	860	39	43	47.5
120	13	14.5	16	870	39	43	47.5
130	13	14.5	16	880	39.5	43.5	48
140	14	15	16.5	890	39.5	43.5	48
150	14.5	15.5	17	900	40	44	48.5
160	15	16.5	18	910	40.5	44.5	49
170	15.5	17	18.5	920	40.5	44.5	49
180	15.5	17	18.5	930	41.5	45.5	50
190	16	17.5	19.5	940	41.5	45.5	50
200	16.5	18	20	950	42	46	50.5
210	17	19	21	960	42.5	46.5	51
220	17	19	21	970	42.5	46.5	51
230	17.5	19.5	21.5	980	43	47	51.5
240	18	20	22	990	43	47	51.5
250	18	20	22	1,000	43.5	48	53
260	18.5	20.5	22.5	1,020	44	48.5	53.5
270	19.5	21	23	1,040	44.5	49	54
280	20	22	24	1,060	45	49.5	54.5
290	20	22	24	1,080	45.5	50	55
300	20.5	22.5	25	1,100	46	51	56
310	21	23	25.5	1,120	47	51.5	56.5
320	21	23	25.5	1,140	47.5	52	57
330	21.5	23.5	26	1,160	48	52.5	58
340	21.5	23.5	26	1,180	48.5	53	58.5
350	22	24	26.5	1,200	49	54	59.5
360	22.5	25	27.5	1,220	49.5	54.5	60
370	22.5	25	27.5	1,240	50	55	60.5
380	23	25.5	28	1,260	50.5	55.5	61
390	23	25.5	28	1,280	51	56.5	62
400	23.5	26	28.5	1,300	51.5	57	62.5
410	24	26.5	29	1,320	52.5	57.5	63.5
420	24	26.5	29	1,340	53	58	64
430	25	27	29.5	1,360	53.5	58.5	64.5
440	25	27	30.5	1,380	54	59	65
450	25.5	28	31	1,400	54.5	60	66
460	26	28.5	31.5	1,420	55	60.5	66.5
470	26	28.5	31.5	1,440	55.5	61	67
480	26.5	29	32	1,460	56	61.5	67.5
490	26.5	29	32	1,480	56.5	62.5	69
500	27	29.5	32.5	1,500	57	63	69.5
510	27.5	30.5	33.5	1,520	58	63.5	70
520	27.5	30.5	33.5	1,540	58.5	64	70.5
530	28	31	34	1,560	59	64.5	71
540	28	31	34	1,580	59.5	65.5	72
550	28.5	31.5	34.5	1,600	60	66	72.5
560	29	32	35	1,620	60.5	66.5	73
570	29	33	35	1,640	61	67	73.5
580	29.5	32.5	36	1,660	61.5	68	75
590	29.5	32.5	36	1,680	62	68.5	75.5
600	30.5	33.5	37	1,700	62.5	69	76
610	31	34	37.5	1,720	63.5	69.5	76.5
620	31	34	37.5	1,740	64	70	77
630	31.5	34.5	38	1,760	64.5	71	78
640	31.5	34.5	38	1,780	65	71.5	78.5
650	32	35	38.5	1,800	65.5	72	79
660	32.5	35.5	39	1,820	66	72.5	80
670	32.5	35.5	39	1,840	66.5	73	80.5
680	33	36.5	40	1,860	67	74	81.5
690	33	36.5	40	1,880	67.5	74.5	82
700	34	37	40.5	1,900	68	75	82.5
710	34	37.5	41.5	1,920	69	75.5	83
720	34	37.5	41.5	1,940	69.5	76	83.5
730	34.5	38	42	1,960	70	77	84.5
740	34.5	38	42	1,980	70.5	77.5	85.5
750	35	38.5	42.5	2,000	71	78	86

[1] To be applied for miscellaneous interior movements; that is, for movements other than to primary markets, ports of export, and other points to which rates are not prescribed herein, either directly or by reasonable relation. Distances are to be computed over routes via which carload traffic can be interchanged without transfer of lading, and between points in differently rated groups the highest scale will apply.

[2] Western trunk-line territory.

[3] Southwestern and Pacific coast territories.

[4] Intermountain territory.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 1st day of July, A. D. 1930

No. 17000

Rate Structure Investigation

Grain and Grain Products Within the Western District and for Export

This proceeding being at issue upon an order of general investigation by the commission, and upon complaints and answers on file, and upon investigation and suspension proceedings, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That all common carriers by railroad operating as such within continental United States, respondents in No. 17000, Part 7, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before October 1, 1930, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of grain and grain products, on domestic shipments within the western district (herein defined as the territory on and west of the Mississippi River, west of Lakes Superior and Michigan, and west of and including Illinois), and on export shipments from the western district, as herein described, and from Lake Erie ports, to Atlantic, Pacific, and Gulf ports, rates which exceed those prescribed in Appendix D to said report; and to cease and desist, on or before the date mentioned, and thereafter to abstain, from practices, including transit, not in accordance with the findings in said report.

It is further ordered, That said defendants, according as they may participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 1, 1930, upon notice to this commission and to the general public by not less than 20 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of grain and grain products within the territory

described in the next preceding paragraph hereof rates which shall not exceed those prescribed in Appendix D of the said report, and practices which are in harmony with the findings in said report.

It is further ordered, That this order shall continue in force until the further order of the commission.

And it is further ordered, That the complaints listed in Appendix A be dismissed, and that the investigation and suspension proceedings listed therein be discontinued.

By the commission.

[SEAL.]

GEORGE B. MCGINTY,
Secretary.

G

U. S. GOVERNMENT PRINTING OFFICE: 1960

INTERSTATE COMMERCE COMMISSION

No. 17000[1]

Rate Structure Investigation Part VII

Grain and Grain Products Within the Western District and for Export

Decided *April 10, 1931.*

1. Upon a further consideration of the record, and for the purpose of better effectuating the intent of the original report and order, 164 I. C. C. 619, findings in original report clarified in some instances and corrected and modified in others.
2. Petitions for reopening or reconsideration of the record not heretofore disposed of denied.
3. Appendix B is merely a typical list of commodities found in the grain-products list in some of the present tariffs, and is not to be viewed as a list of commodities on which Appendix D rates are prescribed.
4. Maintenance of present arbitraries on the Wichita Falls & North Western, the Missouri & North Arkansas, and narrow-gauge lines in Colorado and other states permitted.
5. Distance rates, where conflicting therewith, are to be subordinated to prescribed group rates and rate-break combinations.
6. Published through rates in conflict with prescribed rate-break combinations cancelled.

[1]This proceeding also embraces 58 formal complaints and suspension proceedings (also subnumbers of some of the complaints), as shown in the statement of issues in Appendix A.

7. Findings as to the application of the rate-break combinations interpreted in respect of the exclusive application of proportional rates from the rate-break markets; exceptions to meet carrier competition; and at markets such as St. Paul and Minneapolis, where both the inbound flat rates and the outbound proportionals are the same, and there is no proportional rate between the two markets.

8. Situation at St. Paul and Duluth in respect of the application of the rate-break combination differentiated from that at Minneapolis and Duluth, between which markets there is a proportional rate.

9. Minimum inbound flat rate of 10 cents permitted to the Twin Cities, Duluth, Missouri River markets and St. Louis (from west of St. Louis), in order to avoid departures from the fourth section resulting from the flat rates from the markets exceeding the combinations on those markets.

10. Flat rates from St. Louis to New Orleans and Louisiana reduced.

11. Basis for flat rates from Pine Bluff and Little Rock, Ark., to New Orleans, Louisiana and Texas prescribed in reasonable relation to the flat rates from St. Louis.

12. Minimum rate of 10 cents under the prescribed interior scales permitted.

13. Proportional rate increased from Minneapolis to Chicago and Duluth.

14. Territory from which through rates to Duluth will be combinations on Minneapolis redefined.

15. Proportional rates prescribed from Minneapolis to Sioux City, Omaha and Kansas City. Proportional

rates from Duluth to the same markets prescribed on the basis of the combinations on Minneapolis.

16. Proportional rates prescribed from Minneapolis to Peoria and St. Louis, and from Duluth to Minneapolis, Chicago, Peoria (on the Minneapolis combination) and St. Louis (on the Minneapolis combination).

17. Proportional rates cancelled from Peoria to St. Louis; from Des Moines to all destinations; between Kansas City and St. Joseph; from Memphis to Little Rock; and from Memphis and Cairo to Texas groups.

18. Maintenance of present equalization of inbound and outbound rates through St. Louis, Cairo and Memphis to Louisiana west of the Mississippi River required.

19. The eastern lines should continue the equalization of the St. Louis and Chicago gateways on shipments from Kansas City to trunk line territory, on domestic shipments, pending an appropriate proceeding in respect of the eastern domestic rates.

20. Further findings made in respect of the Illinois "specific" to Chicago.

21. Basis prescribed for rates from on and south of the Union Pacific in Kansas to Omaha.

22. Further findings made in respect of Investigation and Suspension Docket No. 3278.

23. Bases set and revisions made in respect of certain of the southwestern rates.

24. Modification made of findings respecting rates from Sheridan, Wyo., to destinations routing

through Denver and Omaha; from Montana points in the Judith Basin, Gallatin Valley, and Great Northern "triangle" territory to Minneapolis and the north Pacific coast; and from central and western Montana to California. The latter rates required to apply through north Pacific coast terminals.

25. Prescribed rates from Idaho north and east of Pocatello to San Francisco required to apply through Ogden, Utah, as well as over the Rogerson-Wells Cut-Off route.

26. Rates from the Big Bend district of Washington to Portland and Seattle grouped to meet the necessities of cross-country competition.

27. Arbitrary of half a cent to Longview, Wash., over Portland made to apply on grain from Southern Idaho as well as on grain from south of the Snake River.

28. The criticism of transit specifically covered the number of stops and out-of-line and back-hauls, and did not warrant, or justify, a revision of general policing rules not the subject of this criticism. Any general revision of the latter rules should be published in such form as to permit of suspension and the application of the present rules to the prescribed rates if protests so warrant.

29. The limitation of the number of transit stops without separate charge to a maximum of two does not require the granting of transit in connection with each through shipment from origin to final destination. The granting of transit will continue to be a matter for the consideration of the carrier in specific instances upon request.

30. Finding that mixed feed containing other than the direct products of grain must pay a flat rate from the point of manufacture rescinded, and reasonable transit in the manufacture of mixed feed under the prescribed rates permitted, pending a nation-wide investigation of the rates on mixed feed.

31. Findings prohibiting the storage in transit of manufactured grain products reversed, and storage in transit permitted at a separate charge of 2 cents per hundred pounds for each stop.

32. Increased rates on phosphated and self-rising flour to a basis higher than on plain flour not justified upon this record.

33. Modifications in the original report and order made in conformity with the findings herein, and typographical and other obvious errors, such as fourth-section departures, corrected.

SUPPLEMENTAL REPORT OF THE COMMISSION ON FURTHER CONSIDERATION

BY THE COMMISSION:

In the original report (164 I. C. C. 619), in respect of rates and practices affecting the transportation of grain and grain products throughout the western district and for export, we prescribed specific flat and proportional rates and required the construction of rates through markets on reasonably direct routes, from which proportional rates apply, by combination of flat rates to the markets and proportional rates beyond, and prohibited the application, over the routes of the market

combinations, of through rates less than the market combinations, thereby prohibiting also the application of transit balances less than the proportional rates. We prescribed rates only between key points (directing the carriers to establish rates between other points in reasonable relation to the key-point rates), prescribed so-called interior scales for application as maxima where no other rates were prescribed either specifically or by reasonable relation, made definite findings on specific adjustments of rates (some in response to complaints consolidated with the general investigation), and made general findings concerning transit practices, and specific findings concerning some phases of transit.

Petitions for Rehearing Denied

Numerous petitions for rehearing, reargument and reconsideration were filed, by carriers mainly concerning the level of the prescribed rates, and by shippers mainly concerning the relations of rates and the findings in respect of transit, especially transit in the manufacture of mixed feed. Many of these petitions have already been denied by separate orders. All other petitions not heretofore specifically disposed of are hereby denied.

By order of March 3, 1931, the effective date of the order, previously postponed from January 1, 1931, to April 1, 1931, was further postponed to June 1, 1931, because of the inability of the carriers physically to comply with its terms prior to that date. This extension affords an opportunity to correct typographical and other obvious errors (such as fourth-section departures) in

the prescribed rates; to clarify certain of the findings which, owing to the extensive scope of the proceeding, are necessarily general in character and susceptible to different interpretations among shippers and carriers; to make modifications of certain of the findings that seem to be warranted upon further consideration of the record; and to discuss practical problems confronting the carriers in checking in the prescribed adjustment.

Order Amended to Include Water Carriers

The order was inadvertently directed only against common carriers by railroad. Carriers by water subject to the interstate commerce act will be expected to comply with its terms. If they do not comply, an order will be entered.

Explaining Appendix B

Appendix B is merely a list of the commodities taking the rates on grain and grain products in numerous present tariffs, and the findings are not to be construed as prescribing Appendix D rates for all Appendix B commodities. The grain products list is left for the initial establishment of the carriers, subject to review in a suspension or complaint proceeding.

Differential Carriers

Present rates of the Wichita & North Western, the Missouri & North Arkansas, and perhaps other lines

are higher than the rates of other carriers in the same general territories by arbitrary amounts prescribed or approved in formal proceedings. These relations will not be disturbed. Nor do the findings contemplate the prescription of Appendix D rates for narrow-gauge lines.

Distance Rates Subordinated to Group Rates and Rate-Break Combinations

The application of the interior scales, or other distance test, is to be subordinated, where conflicting therewith, to the prescribed rate-break combinations and group adjustments, and to groupings found necessary by the carriers to meet cross-country competition.

Cancellation of Through Rates in Conflict with Rate-Break Combinations

Published through rates in conflict with rate-break combinations from territories from which rate-break combinations are prescribed will be ordered cancelled.

Application of Proportional Rates Required from Primary Markets

The findings under the above caption, at page 645, do not prohibit the application of joint rates through primary markets, and transit balances beyond the markets, where proportional rates from the markets are not in effect. The requirement merely is that a proportional rate, once established, must be charged, and can not be

defeated by a lower transit balance between the same points. For example, transit balances are prohibited from Omaha to Chicago, because there is a proportional rate from Omaha to Chicago, but they are not prohibited from Omaha to north Pacific coast territory, where proportional rates are not in effect (see pages 674-5). But the exclusive application of proportional rates to territories intermediate to terminal markets to which proportionals now apply is permissible. For example, the proportional rate from Omaha to Chicago may be graded back to interior points in Illinois and Iowa to which there are today proportional rates in some instances, and not in others, thereby eliminating varying transit balances to a given destination, and making a constant factor, in the form of a proportional rate, to each destination, regardless of the point of origin back of the market. The proportionals thus established from Omaha should not exceed 5.5 cents for the first 50 miles and should grade up at the rate of 1.5 cents for each additional 50 miles until the terminal proportional rate of 15 cents is reached in the Chicago group. This basis will result in combinations on Omaha approximately equal to the rates that would be applicable under the overhead working scale used in checking in the prescribed rates. The same maximum rate for the first 50 miles and the same general method of grading will govern the other western trunk line proportionals. The grading back of the proportionals from the markets to the Texas and Louisiana groups will take into account the average mileages used in the groupings, and will reasonably relate the rates to the groups and to intermediate territories.

Exceptions to Meet Carrier Competition

The findings under this caption, at page 645, cover instances of one rate-break route competing with a lower route, either direct or rate-break. For example, the direct rate from a point in southeastern South Dakota to Chicago may be applied through Minneapolis on a continuous shipment, but the higher combination on Minneapolis must be charged on a shipment stopped at Minneapolis or other intermediate point on that route; the combination on Omaha from a point in Nebraska to Chicago may be applied through Kansas City on a continuous shipment, but the higher combination on Kansas City must be charged on a shipment stopped at Kansas City or other intermediate point on that route; the proportional rate from Omaha to Chicago may be applied through Kansas City on a continuous shipment, but the higher combination of proportional rates to and from Kansas City must be charged on a shipment stopped at Kansas City or other intermediate point on that route; or the rate of the Missouri Pacific from Kansas City to Little Rock or Memphis, through Carthage, Mo., may be applied over its route through St. Louis on a continuous shipment, but the higher combination on St. Louis must be charged on a shipment stopped at St. Louis or other intermediate point on that route. The purpose of the finding is to prevent the defeat of the proportional rate by a transit balance lower than the proportional, but not otherwise to curtail carrier competition. The restriction is laid on the intermediate point other than the market, as well as upon the market, in order not to discrimi-

nate against the market in favor of the other intermediate points. The reason for the restriction as to all intermediate points would be apparent if the combination rate over the higher route were published as an overhead rate, for then, manifestly, transit would be accorded only at the higher rate applicable over that route. The fact that the market may draw grain from a wider territory than the other intermediate points hardly affords justification for a difference in treatment. Nor would there be justification for permitting a stop at the market and other intermediate points for milling and not for merchandising.[1] But transit may be permitted at intermediate points other than the markets, and not at the markets, on the higher route when the intermediate transit point on the higher route is also a transit point on the direct route. For example, transit may be permitted at Fort Dodge, Ia., but not at Omaha, on a shipment from Sioux City to Chicago, through Omaha, to meet the competition of a direct route from Sioux City to Chicago, with transit at Fort Dodge; or at Mankota, but not at Omaha or Sioux City, on the route from Kansas City to Minneapolis, through Omaha and Sioux City, to meet the competition of a direct route from Kansas City, through Des Moines and Mankato, with transit at Mankato; or at Cedar Rapids, but not at Omaha, on the route from Kansas City, through Omaha, to Chicago, to meet the competition of a direct route from Kansas City to Chicago, with transit at Cedar Rapids.

---

[1]This means merchandising requiring unloading and reshipment. The finding does not prohibit inspection and/or reconsignment in the original car.

RATE-BREAK THROUGH MINNEAPOLIS-ST. PAUL

Clarification is required of another phase of the rate-break combinations, illustrated by the adjustment at Minneapolis and St. Paul. Both the inbound flat rates and the outbound proportionals are the same at these markets, and there is no proportional between the markets. Transit will be permissible at St. Paul under the inbound flat rate to Minneapolis, and at Minneapolis under the inbound flat rate to St. Paul, because there will be no proportional rate between these markets to be defeated. It will not be permissible at St. Paul under the proportional rate from Minneapolis to Chicago, or at Minneapolis under the proportional rate from St. Paul to Chicago, because the proportional rate from the intermediate transit point would be defeated. In other words, the surrender of an inbound expense bill at Minneapolis can be only for the purpose of securing the benefit of a transit balance or a proportional, and will accordingly permit of the further movement under the transit balance of the inbound flat rate to St. Paul, or under the proportional rate from Minneapolis to Chicago, but not under a proportional rate from Minneapolis to St. Paul, because there is no such proportional. The transportation from Minneapolis to St. Paul must therefore be at the transit balance of the inbound flat rate to St. Paul, or at the flat rate from Minneapolis to St. Paul. If at the latter, the surrender of the inbound expense bill at St. Paul will not permit of the retroactive application of the proportional rate from Minneapolis to Chicago, with transit at St. Paul, because the transit balance beyond St. Paul, remaining after deduc-

tion of the flat rate from Minneapolis to St. Paul from the proportional rate from Minneapolis to Chicago, will be lower than the proportional rate from St. Paul to Chicago.

Rate-Break Through Duluth-Minneapolis

The situation at Duluth and Minneapolis differs from that at St. Paul and Minneapolis in that, while the proportional rate from Duluth to Chicago is the same as from Minneapolis to Chicago, there is a proportional rate between Duluth and Minneapolis. Surrender of inbound billing at Duluth will therefore permit of outbound shipment under the proportional rate to Minneapolis or to Chicago. Upon a second stop at Minneapolis the outbound proportional from Minneapolis to Chicago must apply, because the application from Minneapolis to Chicago of the transit balance of the proportional rate from Duluth to Chicago, remaining after deduction of the proportional rate from Duluth to Minneapolis will be prohibited, because it will defeat the higher proportional rate from Minneapolis to Chicago. In the absence of a proportional rate from Duluth to Minneapolis, transit would be permissible at Duluth under the inbound flat rate to Minneapolis; but the granting of such transit would doubtless inspire requests for similar transit at Minneapolis under the inbound flat rate to Duluth, discussed at pages 675-6, under "Minneapolis Transit."

Minimum Inbound Rates to Markets to Avoid Fourth-Section Departures

At page 662 is a discussion of "Protection of Intermediate Flat Rates Under the Rate-Break." In the prescribed adjustment some of the combinations of flat rates to the markets and proportional rates beyond, from stations within a radius of perhaps 80 miles of the markets, are less than the through rates from those stations, or less than the flat rates from the markets on which the combinations are made, or both, in violation of the fourth section. For example, the flat rate from Fremont, Nebr., to Omaha is 8.5 cents, the proportional rate from Omaha to Chicago 15 cents, the through rate from Fremont to Chicago 26 cents, and the flat rate from Omaha to Chicago 24 cents. Both the through rate from Fremont and the flat rate from Omaha therefore exceed the combination on Omaha. These departures from the fourth section could be corrected either by reducing the through rate from Fremont and the flat rate from Omaha, or by increasing one or both of the components of the combination. If the through rate from Fremont were reduced to the combination basis, the flat rate from Omaha would still be higher than the combination on Omaha, and higher than the reduced through rate from Fremont. The flat rate from Omaha can not be reduced to the combination basis without other wide-spread reductions, and without a general disruption of rates from territory between Omaha and Chicago. The situation as to the flat rate from Omaha could be dealt with by making the proportional rate from Omaha apply only

in connection with an inbound rate to Omaha high enough to make the combination on Omaha equal the flat rate from Omaha, or by indicating by tariff symbol after the proportional from Omaha (by so-called "padding") that on shipments from Fremont the proportional rate from Omaha will be increased sufficiently to make a minimum through rate equal to the flat rate from Omaha. In either event the grain from Fremont could not move to Chicago at the lower combination on Omaha shown in the tariff, and the value of the Fremont grain on the Omaha market would be depressed or made uncertain because of the uncertainty as to its final destination. A minimum inbound flat rate of 10 cents to the Missouri River markets (equal to the western trunk line interior scale rate for 70 miles) would avoid fourth-section departures on shipments through those markets to Chicago and St. Louis. An inbound flat rate of less than 10 cents to these markets will not be required. The through rates from points back of the markets will be made on the combination basis. An adjustment with all inbound flat rates as high as 10 cents would not only remove fourth-section departures, but would also result in a proper gradation of rates from the country stations and intermediate points, including the flat rates from the markets.

Minimum Inbound Flat Rate of 10 Cents to Minneapolis and Duluth

To Duluth and Minneapolis an inbound flat rate of less than 10 cents will not be required. The combination of an inbound flat rate of 10 cents to Minneapolis and

the proportional rate of 12 cents to Chicago, as hereinafter revised, would equal the flat rate of 22 cents from Minneapolis to Chicago and meet the requirements of the fourth section.

Restriction of Proportional Rate from Kansas City to Texas

A departure from the fourth section will result from a flat rate of 35 cents from Kansas City to Texas group 3 higher than the combination of the minimum inbound flat rate of 10 cents to Kansas City and the proportional rate of 21 cents beyond. Neither an inbound rate of 14 cents nor a flat rate from Kansas City of 31 cents or a proportional rate from Kansas City of 25 cents, required to clear the fourth section, is justified. The proportional rate of 21 cents, in connection with an inbound rate of less than 14 cents, may be increased sufficiently to make a minimum through rate of 35 cents.

Restriction of Proportional Rate from St. Louis to New Orleans

Because of its effect upon the relation of the combinations through St. Louis, Cairo and Memphis to the Southeast, to which territory rates are in issue in Part 7-A, as yet unheard, and because also of the relation between the rates to St. Louis and Chicago on Illinois grain, a minimum inbound flat rate of 10 cents to St. Louis, except from Missouri west and south of St. Louis, is not justified. An increase in the proportional rate of

19 cents from St. Louis to New Orleans is also not justified. The proportional rate of 19 cents, in connection with an inbound flat rate of less than 10 cents, may be increased sufficiently to make a minimum through rate of 29 cents. The flat rate from St. Louis to New Orleans will be ordered reduced to 29 cents, in observance of the fourth section.

RESTRICTION OF PROPORTIONAL RATE FROM ST. LOUIS TO WESTERN LOUISIANA

Louisiana on and east of the lines of the Rock Island from Randolph south through Ruston, Alexandria and Eunice is grouped with New Orleans, in respect of both the flat and the proportional rate from St. Louis. To Louisiana west of that line, and to Texas, a fourth-section departure will result from a flat rate of 37 cents from St. Louis higher than the combination of the proportional rate of 23 cents from St. Louis plus an inbound flat rate even as high as 10 cents to St. Louis. The flat rate from St. Louis to western Louisiana will be ordered reduced to 35 cents, and the proportional rate of 23 cents, in connection with an inbound flat rate of less than 12 cents, may be increased sufficiently to make a minimum through rate of 35 cents to western Louisiana; and in connection with an inbound rate of less than 14 cents may be increased sufficiently to make a minimum through rate of 37 cents to Texas, in observance of the fourth section.

Flat Rates from Pine Bluff and Little Rock to Louisiana and Texas

Flat rates from Pine Bluff and Little Rock, Ark., to the Louisiana and Texas groups will be less than the flat rates from St. Louis by the amount of the proportional rates to Pine Bluff and Little Rock from St. Louis.

Interior Scales Inapplicable for Charges of Less Than Ten Cents

In view of the findings herein in respect of a minimum inbound rate of 10 cents to the rate-break markets, a rate of less than 10 cents under the prescribed interior scales will also not be required. This will avoid undue preference of shippers under these scales, and undue prejudice to shippers under the prescribed rates to the rate-break markets, or under specific rates made in reasonable relation to the latter rates, and will permit of practicable small group adjustments for short hauls, and tend toward a general simplification and rounding out of the grain-rate adjustment as a whole.

Proportional Rate from Minneapolis to Chicago

The prescribed proportional rate of 11 cents from Minneapolis to Chicago is too low by comparison with the other prescribed proportionals in western trunk line territory, and will be ordered increased to 12 cents. This revision will result in a corresponding revision of the combinations on Minneapolis from points on and north

of the line of the North Western from Mankato to Pierre (see page 662), and will bring about a better relation between these combinations and the direct rates to Chicago from southern South Dakota, southern Minnesota and northwestern Iowa.

Proportional Rate from Minneapolis to Duluth

The increase in the proportional rate from Minneapolis to Chicago from 11 to 12 cents will require an increase in the proportional rate from Minneapolis to Duluth from 4.5 to 5.5 cents, in order to make a proper relation between the Minneapolis combinations to Duluth and the direct rates to Milwaukee and Chicago from south of the Mankato-to-Pierre line described, and in order also to preserve the present relation between the proportional rate from Minneapolis to Duluth and from Minneapolis to Chicago, and the present relation between the rail-lake-and-rail routes through Lake Superior and Lake Michigan ports.

Minneapolis Rate-Break Territory to Duluth Redefined

Owing to the necessities of cross-country competition on the lines of the Northern Pacific, Minneapolis, St. Paul & Sault Ste. Marie and Great Northern, the finding, at page 663, that through rates to Duluth will be combinations on Minneapolis from on and south of the line of the Great Northern west from Minneapolis through Wilmar and Yarmouth, Minn., to Forbes, N. D., including points on the main line of the Milwaukee west from

Minneapolis through Appleton, Minn., and Aberdeen, S. D., to and including Montline, N. D., is modified to make the through rates to Duluth combinations on Minneapolis from on and south of the Great Northern west from Minneapolis through Willmar, to but not including Tintah, Minn.; thence west by imaginary line to the Minnesota-North Dakota state line just south of Fairmount, Minn.; thence southwesterly by imaginary line to the South-Dakota-North Dakota state line just east of La Mars, N. D.; thence west on the state line to the point of its intersection by the Milwaukee just west of Lemmon, S. D.; thence on and south of the line of the Milwaukee west to and including Montline, N. D.

Proportional Rates from Minneapolis to Missouri River Markets

The prescribed proportional rates to Minneapolis are 8.5 cents from Sioux City, 11.5 cents from Omaha, and 15.5 cents from Kansas City. No proportional rates were prescribed in the reverse direction from Minneapolis to these other markets. The movement from Minneapolis to the Missouri River markets is mainly of grain products, and the rates, because of the lighter volume and loading, may properly be higher than in the reverse direction. Rates from Minneapolis of 11.5 cents to Sioux City, 14.5 cents to Omaha, and 17 cents to Kansas City will be ordered. The rate to Kansas City would be 18.5 cents if the relation of the Missouri River markets in the reverse direction were to govern. But the rate of 17 cents hereinafter prescribed from Minneapolis to St. Louis will be the maximum from Minneapolis to Kansas City.

Proportional Rates from Duluth to Missouri River Markets

No proportional rates were prescribed from Duluth to Sioux City, Omaha and Kansas City. The combinations on Minneapolis will apply.

Proportional Rates from Minneapolis to Peoria and St. Louis

No proportional rates were established for this transportation. The present proportional from Minneapolis to Peoria is the same as from Minneapolis to Chicago, and continuation of that relation will be ordered. The present proportional from Minneapolis to St. Louis is the combination on Peoria. A proportional rate of 17 cents will be required, and will be comparable with the prescribed proportional of 16 cents from Sioux City to St. Louis.

Proportional Rates from Duluth to Minneapolis, Chicago, Peoria and St. Louis

No proportionals were prescribed for this transportation. The present proportional from Duluth to Minneapolis is the same as from Minneapolis to Duluth, and the present proportional from Duluth to Chicago the same as from Minneapolis to Chicago. Continuation of these relations will be ordered. The present proportional from Duluth to Peoria is the same as from Minneapolis to Peoria, and the present proportional from Duluth to St.

Louis the same as from Minneapolis to St. Louis. Combinations on Minneapolis will be ordered from Duluth to these markets.

Proportional Rate from Peoria to St. Louis Cancelled

Today grain from northern Iowa and the Missouri River markets can reach the Southeast through Peoria on the St. Louis combination, by reason of transit on the inbound rate to St. Louis (see pages 667-8), which is less than the Peoria combination to St. Louis. The findings prohibit transit at Peoria on the rate to St. Louis, because the transit balance would defeat the proportional rate from Peoria to St. Louis. The result will be that the Peoria combination will place the Peoria market at a disadvantage in competition with St. Louis. The proportional rate from Peoria to St. Louis will be ordered cancelled. This will enable Peoria to continue to transit at the inbound rate to St. Louis, because there will be no proportional rate from Peoria to St. Louis to be defeated.

Des Moines Proportionals Cancelled

At page 669, it is suggested that the chief effect of the proportional rates from Des Moines seems to be to complicate the general proportional rate adjustment through the primary markets, rather than to help Des Moines, and that Des Moines could doubtless operate as well under transit as under proportional rates. The merit in that suggestion is emphasized upon an attempt to

check in the prescribed rates. The necessity for "padding" is more pronounced than at the other markets, and will not be obviated by the minimum inbound flat rate of 10 cents permitted to the Missouri River markets, Minneapolis and Duluth. The interests of Des Moines will be better served by an adequate adjustment of joint rates with transit, and the proportional rates from Des Moines will accordingly be ordered cancelled.

Proportional Rate between Kansas City and St. Joseph Cancelled

The proportional rate between Kansas City and St. Joseph will be ordered cancelled. Except from immediately contiguous territory the inbound flat rates are the same to both markets. The outbound proportionals are also the same. For several years the proportionals between these markets have been but little used, because of the use of transit. With the cancellation of the proportional between these markets the situation in respect of transit in connection with the rate-break will be identical with that hereinbefore discussed at St. Paul and Minneapolis.

The present situation at St. Joseph and Kansas City differs from that at Omaha and Kansas City, or at Sioux City, and Omaha, or at Minneapolis and Duluth, in that the proportionals between the latter markets are actual components of both the inbound and outbound rates to or from one of the markets through the other, whereas the proportionals between St. Joseph and Kansas City are not so used, both the inbound flat rates and the outbound proportionals being usually the same, as already stated.

PROPORTIONAL RATES FROM MEMPHIS TO LITTLE ROCK AND FROM MEMPHIS AND CAIRO TO TEXAS GROUPS CANCELLED

The proportional rate from Memphis to Little Rock will be ordered cancelled. This will permit of the application of the proportional rate from St. Louis to Little Rock, with transit at Memphis, because there will be no proportional from Memphis to Little Rock to be defeated by a lower transit balance.

PROPORTIONAL RATES FROM MEMPHIS AND CAIRO TO TEXAS GROUPS CANCELLED

The proportional rates from Memphis and Cairo to Texas groups will be ordered cancelled, and these markets will transit under the proportional rates from St. Louis to the Texas groups.

EQUALIZATION OF CAIRO WITH ST. LOUIS AND MEMPHIS TO LOUISIANA WEST OF THE MISSISSIPPI

To Louisiana west of the Mississippi River the maintenance of proportional rates 3 cents from Cairo and 9 cents from Memphis less than from St. Louis, designed to effect an equalization of through rates in connection with inbound rates 3 cents to Cairo and 9 cents to Memphis higher than to St. Louis, will be required.

St. Louis-Chicago Equalization to the East

The prescribed proportional rates of 9 cents from Kansas City to St. Louis and 15 cents from Kansas City to Chicago disrupts the long-standing equalization of St. Louis and Chicago from the Missouri River to trunk line territory under which the inbound rate to St. Louis is 4 cents less than to Chicago, and the outbound rate from St. Louis 4 cents higher than from Chicago, inasmuch as the inbound rate from Kansas City to St. Louis will be 6 cents less than to Chicago and the outbound rate from St. Louis 4 cents higher than from Chicago. Maintenance of the equalization could not be required on domestic shipments, because the domestic rates east of Chicago and St. Louis were not in issue. It was assumed that the equalization would be voluntarily continued by the eastern lines pending an appropriate proceeding in respect of the eastern rates.

Illinois Specifics

Illinois grain shipped to Chicago on the so-called "specifics", discussed at page 668, is reshipped largely to the East. Illinois grain shipped to St. Louis is reshipped largely to the Southeast. An equalization of St. Louis to the East with Chicago to the East, in respect of Illinois grain, by the establishment, for example, of proportional rates from St. Louis, applicable only on Illinois grain, or of proportional rates from Illinois to St. Louis, applicable only on shipments to the East, would therefore not place St. Louis on a parity with Chicago

in respect of the final destination territory most important to St. Louis.

Flat rates from Illinois to St. Louis, to the extent they exceed the Illinois lake specifics to Chicago for like distances, are unreasonable, and the present relation between the rates to St. Louis and the specifics to Chicago, from Illinois, subjects St. Louis to undue prejudice and disadvantage and gives to Chicago an undue preference and advantage.

Basis Prescribed for Rates From, On and South of the Union Pacific in Kansas to Omaha

Rates to Omaha 6 cents higher than to Kansas City will be required from on and south of the Union Pacific in Kansas, to correspond with rates to Kansas City 6 cents higher than to Omaha from the North Platte region on and north of the Union Pacific in Nebraska, from which the rates to Kansas City are combinations on Omaha.

Kansas to Southern Missouri Investigation and Suspension Docket No. 3278

The findings as to these rates, at pages 673-4, in so far as they find the proposed schedules not justified, are affirmed. They are modified to require the establishment of rates, except from points in extreme southern Kansas from which the routes through Kansas City would be unduly circuitous, by combination on Kansas City.

CONCERNING CERTAIN OF THE SOUTHWESTERN RATES

Rates from border points in extreme southern Kansas, such as Kiowa, Elkhart, Liberal and Engelwood, to Texas and Louisiana groups will be related to the prescribed rated from contiguous points in Oklahoma, such as Alva, Guymon, Hooker, Fargo and Buffalo, rather than be controlled by any relation with the combination on Kansas City.

Rates from Sayre, Okla., Benonine, Tex., and certain other points in Texas to the southwestern portions of groups 1 and 2 in Texas will be ordered established on a basis to avoid fourth-section departures resulting from the division of Texas groups 1 and 2 by an east-and-west line on shipments from Oklahoma, and by a north-and-south line on shipments from Texas.

The prescribed rates from Hugo, Durant, Ardmore, Muskogee and Tulsa to the Louisiana groups will be ordered increased from 1 to 2.5 cents, in avoidance of fourth-section departures resulting from lower rates from these points than from intermediate northern-Texas points to the same destinations, or resulting from lower rates from these points to the Louisiana groups than to the intermediate Texas groups.

In the interest of a better relation between the point-to-point rates and the rates to the Texas groups the description of Texas group 1, at page 664, is modified to make the last five words read "to but not including Kirkland, Tex.," in lieu of "to but not including Memphis."

Sheridan, Wyo., to Destinations Routing Through Denver and Omaha

The finding, at page 680, that rates from Sheridan, Wyo., are unreasonable to the extent they exceed the contemporaneous rates from Billings, Mont., by more than 5 cents to California and north Pacific coast terminals, and the contemporaneous rates from Denver by more than 15 cents to the east and southwest, is modified to make the rates from Sheridan 15 cents over Denver to destinations in Arizona and western New Mexico routing through Denver, and 34 cents over Omaha to destinations in the southwest, southeast and east routing through Omaha.

From Montana to Minneapolis and the North Pacific Coast

Modification is made of the specific rates prescribed in Appendix D from main and branch line points in Montana, in the Judith Basin and Gallatin Valley, and in the so-called Great Northern "triangle" territory, referred to at page 680. These combined areas embrace roughly the territory bounded by the east-and-west line of the Great Northern from Shelby to Havre, on the north, thence by a line southeastwardly from Shelby to Great Falls, and southwestwardly from Havre to Great Falls, thence all main and branch-line points south and east of Great Falls on the Great Northern Milwaukee and Northern Pacific, including such points as Lewiston, Winfred, Roy, Winnet, Judith Gap, Harlowton, Livings-

ton, Bozeman, Neihart and Cascade. From all of these points, as a group, rates of 37.5 cents to Seattle, and Portland, and 41.5 cents to Minneapolis and Duluth will be required. Some increases will result, the heaviest ones from 35 cents to 37.5 cents from Great Falls to Seattle, and from 34.5 cents to 37.5 cents from Shelby to Seattle. The prescribed rates of 35 cents from Great Falls and 34.5 cents from Shelby are typographically incorrect, and should have been 36.5 cents. The resulting increase to Seattle and Portland is therefore really only 1 cent. Offsetting reductions will result from branch-line points, and the average general result will be a slight reduction. The revision will largely preserve the present grouping, equalize main and branch-line shippers and cross-country points on competing lines, and tend toward a more stable adjustment.

MONTANA TO CALIFORNIA

At page 680 rates from central and western Montana were prescribed on the basis of arbitraries over Pocatello, Ida., of 15 cents from Havre, Shelby, Billings, Lewiston, Great Falls and Harlowton; 11 cents from Helena; and 8 cents from Butte; resulting in rates from Great Falls, a typical point in the center of the group, of 55.5 cents to San Francisco and 57.5 cents to Los Angeles. The finding as to this adjustment is modified to make to all of California, as one destination group, rates of 55 cents from Montana points on and west of the Great Northern from Gateway to Columbia Falls, thence by air line passing just west of Augusta through Helena

to Butte, and 62 cents from Montana points east of that line to and including points on and west of a line drawn from Havre through Lewiston to Billings.

The short routes from Montana to most of California, including San Francisco and Los Angeles, are through Pocatello, and the carriers would be technically within their rights in establishing the prescribed rates only over these routes. This would short-haul the Montana lines, which have their own rails westward through Spokane to Seattle and Portland and the long haul on shipments from Montana to California. The routes through Pocatello are longer, and the prescribed rates higher, to points in California north of San Francisco and Los Angeles than to either of these terminals, which would result in departures from the fourth-section over the routes through Seattle and Portland, because of the higher rates to the points intermediate to San Francisco and Los Angeles than to those terminals over these routes. The groupings of California destinations will avoid these fourth-section departures, and the revised rates, representing an average slight increase, will be high enough to warrant their application over the longer routes through Seattle and Portland, and will so apply.

The revised rates, applied over the routes through Seattle and Portland, will also enable millers in Montana, Washington and Oregon, grinding Montana wheat for shipment to California, more effectively to compete with flour shipped from Colorado, Nebraska and Kansas to California, and will correct a maladjustment resulting from the prescribed rates from Montana being relatively lower than the prescribed rates from Colorado.

Idaho to California

From Idaho north and east of Pocatello the present rates are, and for many years have been, the same to San Francisco as to Los Angeles. The prescribed rates are a maximum of 2 cents less to San Francisco than to Los Angeles. To San Francisco the distance is 68 miles shorter over the Rogerson-Wells cut-off route than over the Ogden route. In recent cases, in view of the cost of operation over the cut-off route, rates based on the inclusion of the mileage over the Rogerson-Wells line at a constructive 150 per cent. of the actual mileage were authorized. *Idaho* v. *Oregon S. L. Co.*, 157 I. C. C. 501; *State of Idaho* v. *Oregon Short Line R. Co.*, 171 I. C. C. 763. The constructive mileage from the Idaho territory here in question to San Francisco, using the constructive mileage from Rogerson to Wells, is only 21 miles shorter over the cut-off route than the actual mileage over the Ogden route. Using the same constructive mileage between Rogerson and Wells, and the shortest route to each point, the distance is 55 miles less to San Francisco than to Los Angeles. The differences in favor of San Francisco in the prescribed rates are justified. It is to be expected that the prescribed rates from this Idaho territory to San Francisco will be made applicable, with the usual transit, over both the cut-off route and the Ogden route.

Big Bend District to Portland and Seattle

The finding in prescription of specific rates from the Big Bend district in Washington north of the Snake

River to Portland and Seattle is modified to make four origin groups with the following rates:

From	Portland	Seattle
Group 1[a]	19.5	17
Group 2[b]	20.5	18
Group 3[c]	20.5	19.5
Group 4[d]	23	20

[a]Neppel, Wheeler, Ruff, Bassett Junction, Shrag, Warden, West Warden, Eind, Novara, Bruce, Connell, Cunningham, and intermediate stations.

[b]Odessa, Downs, Moody, Schoonover, Marcellus, Tokio, Ritzville, Paha, Vassar, Ralston, Marengo, Emden, Macall, Revere, Lantz, and intermediate stations.

[c]Keystone, Sprague, Kline, Cheney, South Cheney, Croskey Wells, Rockwell, Lamont, Rodna, Amber, Lavista, Malden, and intermediate stations.

[d]Four Lakes, Espanola, Lyons, Rearden, Davenport, Omans, Eleanor, Telford, Bluestem, Mohler, and intermediate stations.

The revised rates will represent both increases and reductions, but will average about the same as the prescribed rates.

The revision is necessitated by practical considerations of cross-country competition. For example, to Seattle a rate of 19 cents can not be maintained from Bruce, on the Northern Pacific, in competition with 15.5 cents across country from Novara, on the Milwaukee. The same is true of a rate of 17.5 cents from West Warden, on the Northern Pacific, in comparison with 16.5 cents from Warden, on the Milwaukee. Nor can this range of rates be applied from these four closely grouped stations.

Present rates are grouped from both north and south of the Snake River. The group adjustment south of the Snake was not disturbed. The revised group rates

will harmonize better with the adjustment from south of the Snake for similar mileages, and will aid in the avoidance of fourth-section difficulties. This revision is in accordance with the suggestion at page 661 that reasonable groupings of origin and destination points are proper.

Longview, Wash., Arbitrary

The arbitrary of half a cent over Portland to Longview, Wash., will apply from southern Idaho as well as from south of the Snake River.

Transit

The criticism of transit, at page 653, while in a sense general, is directed specifically only to the number of transit stops permitted, the lack of reasonable limitation of out-of-line and competitive routes and back-hauls, and the failure to cancel obsolete transit provisions that serve only to confuse, or to invite unreasonable transit requests, and does not require, or justify, a revision of general policing rules governing transit that are not the subject of this criticism. In fact, the finding specifically is that "A strict rule governing all phases of transit will not be undertaken at this time, but some limitations are here deemed necessary." The limitations then suggested in the text immediately following the last quoted excerpt are confined to those specified above, in the finding that "present transit practices are unreasonable and unduly preferential and prejudicial to the extent they are not in harmony with the foregoing conclusions." Any pro-

posed revision of general transit rules by the carriers to an extent greater than that suggested above will therefore not be properly attributable to our findings, and will be published in such a way as readily to permit of suspension and the retention of the present general transit rules for application in connection with the prescribed rates, in case protests so warrant.

The limitation of the number of transit stops without separate charge to a maximum of two does not require the granting of two such transits in connection with each through shipment from origin to final destination. Nor does it affect the carriers' present exercise of judgment as to the necessity for transit in specific instances, which will continue to be governed by the facts presented to the carriers. It is to be assumed that transit will not be unreasonably withheld as a result of these findings. Transits to the number of two, when granted, will be without separate charge. Nothing herein said is to be construed as suggesting, or warranting, the elimination of present transits not exceeding two, or as authorizing more than two transits without separate charge. In the consideration of transit upon this record ports of export (on export shipments) and terminal markets and gateways at the border of the western district and Illinois, such as Chicago, Peoria, St. Louis, Cairo, Memphis and New Orleans, from which direct shipments are made into other territories, are to be considered as final terminal destinations, where the shipment under transit ends.

TRANSIT ON MIXED FEED

At page 656 the finding was that mixed feed containing other than the direct products of grain is a new commodity, on which flat rates from the point of manufacture should apply. The finding in principle is sound and would be given application if rates on mixed feed were being initially prescribed. But the present transit practices in connection with the manufacture of this commodity are the result of a gradual development over a period of years, the change suggested in the original report would be far reaching in its effects on the mixed-feed industry, and it should not be made unless imperatively required. The elimination of the unit rule will result in a diminution of the abuses which have focused attention on the mixed-feed industry in this proceeding. The finding as to transit on mixed feed will be rescinded, and the carriers will be permitted to give reasonable transit under the prescribed rates, pending a further and general investigation in this docket of the rates and transit practices on mixed feed throughout the entire country. The granting of transit on this commodity will be subject to the general transit limitations hereinbefore prescribed. For example, a transit stop for the manufacture of mixed feed will be considered as one of the two stops permitted without separate charge, but will be subject to a separate charge when it is the third stop from the origin of the grain.

Storage in Transit

The finding, at page 657, prohibiting the storage in transit of manufactured products of grain which leave point of origin or intermediate transit point as manufactured products, for concentration at the storage point into outbound shipments, in straight or mixed carloads, and not for further processing, is rescinded. A separate charge of 2 cents per hundred pounds for each stop for storage in transit will be ordered. There will be no free stops for storage in transit. Storage in transit means storage beyond the point of manufacture. For example, a stop for milling of grain received direct from the company station of origin will be one of the two transits permitted without separate charge, but a stop of the bran or flour at a point beyond the point of manufacture, for storage, although only the second transit stop from the origin point of the grain, will be subject to a separate charge of 2 cents.

Prepared Flours

No specific finding was made in respect of phosphated flour or self-rising flour. Testimony was not offered as to these specific commodities. Phosphated flour is plain flour containing not more than one-half of one per cent. of phosphate; self-rising flour is plain flour containing an average of not more than approximately 5 per cent. of phosphate, salt and soda. *Transit on Phosphated Flour*, 81 I. C. C. 738. Self-rising flour was accorded the same rate as plain flour in *Aunt Jemima Mills Co.*

v. *Director General,* 83 I. C. C. 549. Respondents' tariffs permit transit on the basis of the grain-products rate on the entire weight of the shipment when the content of the commodities other than flour is not to exceed 5 per cent., and transit on the same basis on the weight of plain flour when the content of the commodities other than flour is in excess of 5 per cent. and not in excess of 20 per cent., the flour rate from the transit point to be applied on the non-transit commodities. The record, with its lack of testimony as to these specific commodities, manifestly warrants no finding in revision of these transit practices.

Miscellaneous Corrections and Modifications

The foregoing requires an amendment of Appendix D. Tables substantially changed are reproduced as a part of the report, separately from the text. Minor changes in other tables will be made as shown below. The page number, the caption of the table, the station, and the change in the prescribed rate in cents per hundred pounds are shown. Certain corrections in the text are also made.

Page 663, last paragraph, line 31: Change "four groups" to "five groups."

Page 664, table at top of page: Change "Proposed" to "Prescribed." Last paragraph, under "Notes", change to read:

> Embraces the remainder of the 20.5-cent group to the Colorado border. Cedar Bluff, Montezuma, and Sublite will be in the 18.5-cent group; Atwood, Santa Fe, Moses, and Hugoton

in the 20-cent group; and Bird, St. Francis, Johnson, Rolla, and Elkhart in the 22-cent group.

Page 794, Proportional Rates: To Louisiana group 3 from Kansas City, 41 to 37[1] cents.

Page 797, change caption of second table from "Colorado to Missouri River" to Colorado to Omaha-Kansas City; eliminate Sedgwick; Lucerne 29 to 28; Eastern Colorado Transcontinental Groups G & J to New Mexico and El Paso, Tex.; Deming 38 to 39.5; Change reference 2 to "Average of present rates of 53 and 56 cents."

Page 798, Colorado to Texas Group 3: Lamar 49 to 47; from Colorado to Louisiana Group 3, on and East of the Rock Island south through Ruston, Alexandria, and Eunice including New Orleans: Lamar 54 to 52; from Eastern Colorado transcontinental groups to the Pacific Coast: Change reference 3 to "Average of present rates of 53 and 56 cents."

Page 800, Southern Idaho and Utah common points to California: Mountain Home to: San Francisco, 47 to 41.5; Weed 50.5 to 46.5; Fresno 49 to 44.5; Bakersfield 51.5 to 48; Santa Barbara 56 to 52.5. St. Anthony to: Los Angeles 48 to 46; Fresno 44 to 47; Santa Barbara 52.5 to 51.5. Pocatello to: Fresno 41.5 to 43.5; Santa Barbara 47.5 to 48.5.

Page 802, Southern Idaho to Seattle: Bancroft 37 to 38; Iowa to Chicago, Estherville 24 to 23, Algona 22 to 21.

Page 803, Iowa to Minneapolis: Storm Lake 16 to 17.5; Sac City 19.5 to 17.5, Sioux City (local) 18 to 18.5; Iowa to Kansas City: Cherokee 21.5 to 20, Sheldan 20.5 to 20.

---

[1]Present rates. Other figures are prescribed rates.

Page 804, Kansas to Chicago: Olathe 24 to 25; Ottawa 25.5 to 25; Dodge City, Wakeeney, Satanta and Grainfield, 33 to 33.5; Kansas to Kansas City: Olathe 7 to 10; Ottawa 8.5 to 10; Dodge City, Wakeeney, Satanta and Grainfield 18 to 18.5.

Page 805, Kansas to Texas group 3, including Galveston and Houston: Kingman 37 to 34; Kansas to Louisiana group 3, on and east of the Rock Island, south through Ruston, Alexandria, and Eunice, including New Orleans: Kingman 42 to 39.

Page 807, Western and Northern Missouri to Chicago: Martinsburg 21 to 19; Marysville 20.5 to 24; Wellsville 21 to 19; western Missouri to Kansas City: Carrollton 9 to 10, Harrisonville 8 to 10, Higginsville 8.5 to 10; Platte City and Plattsburg 7.5 to 10; Warrensburg 9 to 10; western and northern Missouri to St. Louis: St. Charles 7 to 10.

Page 808, Southeastern Missouri to St. Louis; Belmont 16 to 17; Melby 16.5 to 17; Anniston 18 to 17; Blackwell 9 to 10; eliminate Riverside and Koch.

Page 809, Southeastern Missouri to Memphis, Tenn.: Eliminate Riverside.

Page 810, Nebraska to Chicago: Lincoln, Fremont, Schuyler 26 to 25; Columbus 25.5 to 25; Nebraska to Omaha: Lincoln and Fremont 8.5 to 10; Schuyler 9 to 10; Columbus 10.5 to 10.

Page 811, Nebraska to Kansas City: Lincoln 14.5 to 15; Fremont 14.5 to 16; Schuyler 15 to 16; Columbus 16:5 to 16.

Page 812, North Dakota to Minneapolis and Duluth: Antler 25 to 26; Pembina 22 to 21; Dunseith 26 to 25.

Page 813, Oklahoma to Chicago: Guthrie and Kingfisher 34.5 to 34; Oklahoma to Kansas City: Guthrie and Kingfisher 19.5 to 19.

Page 814, Oklahoma to St. Louis: Altus 33 to 32; Anadarko 39 to 29; Chickasha 39 to 29; Guthrie and Kingfisher 28.5 to 28; Oklahoma to Texas Group 3, Including Galveston and Houston: Guymon 36 to 37.

Page 815, Oklahoma to Louisiana Group 3, on and east of the Rock Island south from Randolph through Ruston, Alexandria and Eunice: Ardmore 27.5 to 28.5; Durant 26 to 28.5; Hugo 24 to 26; Mangum 32.5 to 34; Muskogee 29 to 30.5; Tulsa 31 to 32.

Page 816, Washington and Oregon south of the Snake River to Seattle: Wayland 19 to 19.5.

Page 818, Texas to Kansas City: Floydada 30 to 29.5; Stratford 24 to 26; Texas to Texas Group 3, Including Galveston and Houston: Floydada 31 to 29.5.

Page 819, Texas to Memphis: Ballinger 34.5 to 36; Texas to Vicksburg: Ballinger 29.5 to 31; Texas to Louisiana Group 3, including New Orleans: Ballinger 34.5 to 36.

Page 821, Wisconsin to Milwaukee: Kenosha 7.5 to 8; Waukesha 6 to 8.

Page 822, Change reference 1 to read:

> "To be applied for miscellaneous interior movements; that is, for movements other than to (or via) primary markets, ports of export, and other points to which rates are prescribed herein, either directly or by reasonable relation. Distances are to be computed over routes via which carload traffic can be interchanged without trans-

fer of lading, and between which points in differently rated groups the highest scale will apply."

The prescription of a key-point rate from Klamath Falls, Oreg. to Portland, Oreg., was inadvertently omitted. A rate of 24 cents will be ordered.

We find that the present rates and practices of respondent carriers, to the extent they do not conform to the rates and practices required in the original report and order, as corrected, modified and supplemented herein, are unreasonable and unduly prejudicial. The original report and order are corrected, modified and supplemented accordingly.

McMANAMY, *Commissioner,* concurring in part:

I approve the correction of obvious errors relating to mileage and rates which in the process of preparation unavoidably crept into the report, also the interpretations herein made of our former report and order. I do not approve other changes made in rates, groupings, or transit rules.

COMMISSIONER MAHAFFIE did not participate in the disposition of this case.

Docket No. 17000, Part 7—Revised Page 794.

PROPORTIONAL RATES

(In cents per 100 pounds)

	Prescribed	Revised
To Duluth from—		
Minneapolis	4.5	5.5
Sioux City	13	14
Omaha	16	17
Kansas City	20	21
To Minneapolis from—		
Sioux City	8.5	8.5
Omaha	11.5	11.5
Kansas City	15.5	15.5
Duluth	..	5.5
To Chicago from—		
Minneapolis	11	12
Sioux City	15	15
Ohama	15	15
Kansas City	15	15
Duluth	..	12
To Peoria from—		
Minneapolis	..	12
Duluth	..	17.5
To St. Louis from—		
Sioux City	16	16
Omaha	13	13
Kansas City	9	9
Minneapolis	..	17
Duluth	..	22.5
To Sioux City from—		
Minneapolis	..	11.5
Duluth	..	17
To Kansas City from—		
Omaha	6	6
Minneapolis	..	17
Duluth	..	22.5
To Omaha from—		
Sioux City	3	3
Minneapolis	..	14.5
Duluth	..	20
To Memphis from—		
Omaha	22	22
Cairo	..	6
Kansas City	16	16
St. Louis	9	9
To New Orleans from—		
Cairo	..	16
Memphis	10	10
St. Louis	19	19
Kansas City	26	26
Omaha	32	32
To Texas Group 3 from—		
Kansas City	21	21
Omaha	27	27
St. Louis	23	23
To Louisiana Group 3 from—		
Kansas City	26[3]	26[3]
Omaha	32[3]	32[3]
St. Louis	23[4]	23[4]
Memphis	..	14[4]
Cairo	..	20[4]
To Little Rock from—		
Kansas City	16	16
Omaha	22	22
St. Louis	10	10
Cairo	..	7
To Texarkana from—		
Kansas City	16	16
Omaha	22	22
St. Louis	16	16
Cairo	..	13
Memphis	...	7

[3] West of the Rock Island from Randolph south through Ruston, Alexandria, and Eunice 3 cents less.

[4] On and east of above line 4 cents less.

Docket No. 17000, Part 7—Revised Page 803.

IOWA TO OMAHA

	Prescribed	Revised		Prescribed	Revised
Manning	9	10	Clarinda	9	10
Storm Lake	14	14	Centerville	15.5	15.5
Fort Dodge	13	13	Creston	11	11
Cherokee	15.5	14	Chariton	13.5	13.5
Sheldon	14.5	14	Rock Rapids	20.5	15
Algona	15	15	Boone	13	13
Hawarden	13	13	Merrill	13	13
Luverne	16	15	Onawa	17.5	10
Shenandoah	8	10			

Present rate on wheat from Onawa is 11 cents instead of 19 cents, and on corn 10 cents instead of 17 cents as shown in the report.

Docket No. 17000, Part 7—Revised Page 804.

Iowa to Texas Group 3, including Galveston and Houston

	Prescribed	Revised		Prescribed	Revised
Storm Lake	41.5	41	Shenandoah	35	35
Fort Dodge	40.5	40	Clarinda	34.5	34.5
Cherokee	42.5	41	Centerville	36.5	36.5
Sheldon	42	41	Creston	35	35
Algona	40.5	42	Chariton	36.5	36.5
Indianola	37.5	37.5			

Docket No. 17000, Part 7—Revised Page 806.

Minnesota to Duluth

	Prescribed	Revised		Prescribed	Revised
Albert Lea	15.5	16.5	Miloma	18	19.5
Appleton	17.5	19.5	New Ulm	16.5	16.5
Breckenridge	16.5	16.5	Ortonville	18.5	20.5
Crookston	17.5	17.5	Paynesville	15.5	15.5
Evansville	15.5	16.5	Pipestone	19.5	20.5
Fairmont	18	18.5	Red Wing	15	15.5
Faribault	15.5	15.5	Rochester	16	17
Fergus Falls	15.5	15.5	Sauk Center	14.5	15
Glenwood	15.5	15.5	Staples	13	13
Glyndon	16.5	16.5	Tintah	19	16.5
Granite Falls	16.5	18.5	Willmar	15.5	16.5
Hanley Falls	17.5	18.5	Winona	16	17
Luverne	20	21	Winnebago	16.5	18.5
Mankato	16	15.5	Worthington	18.5	20.5
Marshall	18	19.5			

Minnesota to Chicago

	Prescribed	Revised		Prescribed	Revised
Albert Lea	21	21	Miloma	25	24
Appleton	24	26	New Ulm	21.5	23
Breckenridge	26.5	27.5	Ortonville	25	27
Crookston	29	30	Paynesville	21.5	23
Evansville	24	26	Pipestone	25	26
Fairmont	24	23	Red Wing	21	20
Faribault	21.5	21.5	Rochester	19.5	19.5
Fergus Falls	25	26	Sauk Center	22.5	24.5
Glenwood	24	25	Staples	24	25
Glyndon	27	28	Tintah	25.5	26.5
Granite Falls	24	25	Willmar	22	23
Hanley Falls	24	25	Winona	18.5	18.5
Luverne	25	25	Winnebago	22	22
Mankato	21	22	Worthington	25	24
Marshall	25	26	Minneapolis	22	22

Minnesota to Minneapolis

	Prescribed	Revised		Prescribed	Revised
Albert Lea	11	11	Miloma	14	14
Appleton	13	14	New Ulm	10.5	11
Breckenridge	15.5	15.5	Ortonville	14	15
Crookston	18	18	Paynesville	10.5	11
Evansville	13	14	Pipestone	15	15
Fairmont	13	13	Red Wing	7.5	10
Faribault	8	10	Rochester	11.5	11.5
Fergus Falls	14	14	Sauk Center	11.5	12.5
Glenwood	13	13	Staples	13	13
Glyndon	16	16	Tintah	14.5	14.5
Granite Falls	13	13	Willmar	11	11
Hanley Falls	13	13	Winona	11.5	11.5
Luverne	15.5	15.5	Winnebago	12	13
Mankato	10	10	Worthington	14	15
Marshall	14	14			

Docket No. 17000, Part 7—Revised Page 808.

Missouri to Louisiana Group 3, including New Orelans

	Prescribed	Revised		Prescribed	Revised
St. Louis (local)	[1]33	[1]29	Springfield	[2]36	[2]36
Sikeston	[1]30	[1]29	Kansas City		
Carthage	[2]36	[2]36	(local)	[2]40	[2]37

[1]West of the Rock Island from Randolph, south through Ruston, Alexandria, and Eunice 4 cents higher.
[2]West of the above line 3 cents less.
Booneville intentionally eliminated.

Docket No. 17000, Part 7—Revised Page 809.

Montana to Minneapolis-Duluth

	Prescribed	Revised		Prescribed	Revised
Billings	37	37	Judith Gap	40	41.5
Bozeman	41	41.5	Kalispell	46	46
Culberston	30	30	Laurel	37.5	37.5
Cut Bank	42	42	Lewistown	40.5	41.5
Forsyth	34	34	Livingston	40.5	41.5
Glasgow	34	34	Missoula	46.5	46.5
Great Falls	41.5	41.5	Ringling	40.5	41.5
Hardin	38.5	38.5	Shelby	41	41.5
Harlowton	38.5	41.5	Terry	31.5	31.5
Havre	38	41.5	Yates	29.5	29.5
Helena	43.5	43.5	Ryegate	38	38

Montana to Chicago

	Prescribed	Revised		Prescribed	Revised
Billings	48	49	Judith Gap	51	53.5
Bozeman	52	53.5	Kalispell	57	58
Culbertson	41	42	Laurel	48.5	49.5
Cut Bank	53	54	Lewiston	51.5	53.5
Forsyth	45	46	Livingston	51.5	53.5
Glasgow	45	46	Missoula	57.5	58.5
Great Falls	52.5	53.5	Ringling	51.5	53.5
Hardin	49.5	50.5	Shelby	52	53.5
Harlowton	49.5	53.5	Terry	42.5	43.5
Havre	49	53.5	Yates	40.5	41.5
Helena	54.5	55.5	Ryegate	49	50

Docket No. 17000, Part 7—Revised Page 810.

*Montana to Seattle-Portland**

	Prescribed	Revised		Prescribed	Revised
Billings	38	38	Judith Gap	37.5	37.5
Bozeman	34	37.5	Kalispell	30	30
Culbertson	45	45	Laurel	37.5	37.5
Cut Bank	34	34	Lewistown	38.5	37.5
Forsyth	41	42	Livingston	34.5	37.5
Glasgow	42	42	Missoula	27	27
Great Falls	34	37.5	Ringling	38	37.5
Hardin	40.5	40.5	Shelby	34.5	37.5
Harlowton	37	37.5	Terry	40.5	43.5
Havre	37.5	37.5	Yates	49.5	46.5
Helena	31.5	31.5	Ryegate	34	37.5

*Rates in report were specifically prescribed to Seattle only.

Docket No. 17000, Part 7—Revised Page 812.

North Dakota to Chicago

	Prescribed	Revised		Prescribed	Revised
Williston	28.5	39.5	Tuttle	33	34
Northgate	37	38	Pingree	31.5	32.5
Rugby	34	35	Carrington	31.5	32.5
Antler	36	38	Jamestown	30.5	31.5
Devils Lake	32	33	Esmond	34	35
Pembina	33	33	Hannah	33	34
Dunseith	37	37	Conway	31	32
Walhalla	32.5	33.5	Northwood	30	31
Grand Forks	30	31	Portland	29.5	30.5
Fargo	27.5	28.5	Grafton	31	32
Killdeer	28	39	Sanborn	30	31
Turtle Lake	35	36	Marion	30.5	31.5
Beach	39	40	Casselton	28	29
Scoria	38	39	Milnor	28.5	29.5
Dickinson	37	38	Sharon	30	31
Hebron	36	37	Neche	32	33
Sykeston	32	33			

Docket No. 17000, Part 7—Revised Page 817.

South Dakota to Chicago

	Prescribed	Revised		Prescribed	Revised
Yankton	24	26	Huron	29.5	30
Scotland	25.5	27	Redfield	31	31
Tyndall	25.5	27	Watertown	27	28
Sioux Falls	26	26	Faulkton	31	32
Parker	26	27	Aberdeen	29	30
Wagner	27	28	Roscoe	31	32
Salem	27	27	Pierre	34	34
Madison	28	28	Presho	34	33
Vilas	28	28	Stamford	36.5	36
Wentworth	28	28	Imlay	38.5	38
Mitchell	27	28	Rapid City	40	40
Platte	28	29	Faith	38.5	39.5
Plankinton	28.5	29	Isabel	36.5	37.5
Stickney	28	29	Van Metre	36.5	36.5
Tripp	26.5	27	Powell	38	39
Woonsocket	29	29	Underwood	40.5	41
Arlington	29	28	Bonesteel	29	29
Wolsey	30	31	Gregory	30.5	30.5
Chamberlain	30.5	30.5	Winner	31	32.5

South Dakota to Minneapolis

	Prescribed	Revised		Prescribed	Revised
Yankton	18.5	19.5	Wolsey	19	19
Scotland	20.5	20.5	Chamberlain	24	24
Tyndall	20.5	20.5	Huron	18	18
Sioux Falls	16.5	16.5	Redfield	19	19
Parker	18.5	17.5	Watertown	16	16
Wagner	21	21.5	Aberdeen	18	18
Salem	17.5	17.5	Roscoe	20	20
Madison	18	17	Pierre	23	22
Vilas	18.5	18.5	Presho	27.5	26
Wentworth	16.5	17	Stamford	29	29
Mitchell	19	19	Imlay	31.5	31
Faulkton	20	20	Rapid City	29.5	29.5
Platte	22	22.5	Faith	27.5	27.5
Plankinton	23	21	Isabel	25.5	25.5
Stickney	22	22.5	Van Metre	26	24.5
Tripp	20.5	20.5	Powell	27	27
Woonsocket	19	19	Underwood	29.5	29
Arlington	16.5	16.5			

Docket No. 17000, Part 7—Revised Page 818.

South Dakota to Sioux City

	Prescribed	Revised		Prescribed	Revised
Yankton	11	11	Huron	14.5	15
Scotland	11	12	Redfield	16	16
Tyndall	11	12	Watertown	16	16
Sioux Falls	11	11	Faulkton	18.5	18.5
Parker	11	12	Aberdeen	17.5	17.5
Wagner	12	13	Pierre	19	19
Salem	12	12	Roscoe	18.5	18.5
Madison	12	13	Presho	18	18
Vilas	13	13	Stamford	21	21
Wentworth	13	13	Imlay	23	23
Mitchell	12	13	Rapid City	25	25
Platte	13	14	Faith	27	27
Plankinton	13.5	14	Isabel	25	25
Stickney	13	14	Van Metre	21.5	21.5
Tripp	12	12	Powell	23	24
Woonsocket	14	14	Underwood	25	26
Arlington	14	14	Bonesteel	14	14
Wolsey	15	16	Gregory	15.5	15.5
Chamberlain	15.5	15.5	Winner	16	17.5

Docket No. 17000, Part 7—Revised Page 820.

Washington (Big Bend District) to Seattle

	Prescribed	Revised		Prescribed	Revised
Lyons	20	20	Revere	18	18
Espanola	20	20	Ralston	18	18
Bluestem	19.5	20	Lind	16.5	17
Downs	18.5	18	Neppel	16.5	17
Odessa	18	18	Ruff	16.5	17
Wilson Creek	17.5	17.5	Schoonover	17.5	18
Adrian	16.5	16.5	Marcellus	17.5	18
Cheney	19.5	19.5	Novara	15.5	17
Croskey	18.5	19.5	Ephrata	16	16
Emden	17.5	18	Riparia	19.5	19.5
Marengo	17.5	18	La Crosse	19.5	19.5
Malden	19.5	19.5	Farrington	19	19
Lavista	20	19.5	Cunningham	17.5	17

Washington (Big Bend District) to Seattle (Continued)

	Prescribed	Revised		Prescribed	Revised
Winona	21	21	Amber	20.5	19.5
Washtucna	18	18	Reardon	20	20
Pasco	17.5	17.5	Davenport	19.5	20
Connell	18	17	Creston	19	19
Bruce	19	17	Wilbur	18.5	18.5
West Warden	17.5	17	Hanson	17.5	17.5
Nagel	17	17	Coulee	17.5	17.5
Lamont	21	19.5	Omans	20	20

Washington (Big Ben District) to Portland

	Prescribed	Revised		Prescribed	Revised
Lyons	22.5	23	Ephrata	20.5	20.5
Espanola	23	23	Riparia	19.5	19.5
Bluestem	23	23	La Crosse	19.5	19.5
Downs	22	20.5	Farrington	18	18
Odessa	22	20.5	Cunningham	18.5	19.5
Wilson Creek	21	21	Winona	20	20
Adrian	20	20.5	Washtucna	18	18
Cheney	20	20.5	Pasco	17	17.5
Croskey	19	20.5	Connell	18	19.5
Emden	18.5	20.5	Bruce	19	19.5
Marengo	18.5	20.5	West Warden	19.5	19.5
Malden	21	20.5	Nagel	20	20
Lavista	20.5	20.5	Lamont	20.5	20.5
Revere	20	20.5	Amber	21	20.5
Ralston	19	20.5	Reardon	22.5	23
Lind	18	19.5	Davenport	23.5	23
Neppel	22.5	19.5	Creston	22.5	22.5
Ruff	22	19.5	Wilbur	22	22
Schoonover	23	20.5	Hanson	21.5	21.5
Marcellus	23.5	20.5	Coulee	21	21
Novara	21.5	19.5	Omans	23.5	23

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 10th day of April, A. D. 1931.

No. 17000

Rate Structure Investigation

Grain and Grain Products Within the Western District and for Export

This proceeding being at issue upon an order of general investigation by the commission, and upon complaints and answers on file, and upon investigation and suspension proceedings, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had; and the commission having, on July 1, 1930, made and filed its original report, containing its findings of fact and conclusions thereon; and having on that date entered its original order, effective upon notice to this commission and to the general public by not less than 20 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, in which the said original report was referred to and made a part thereof; and having, by appropriate subsequent orders, postponed the effective date of the original order to June 1, 1931; and the commission having further, on the date hereof, made a supplemental report on further consideration, intended to correct, modify and supplement its original report and order, which said original report and order and the sup-

C25

plemental report on further consideration are hereby referred to and made a part hereof:

IT IS ORDERED, That the said original report and order, the latter as postponed in effective date, be, and they are hereby, corrected, modified and supplemented accordingly, to become effective on June 1, 1931, upon notice to this commission and to the general public of not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act.

By the commission.

GEORGE B. MCGINTY,
Secretary.

(SEAL)

No. 14393.

PUBLIC UTILITIES COMMISSION OF KANSAS v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

Submitted May 11, 1923. Decided October 11, 1923.

General basis of rates on grain, grain products, and hay within the western group not shown upon the present record to be unjust or unreasonable. Case reopened to permit the development of a more complete record.

Clyde M. Reed and *P. A. Conway* for complainant.

J. H. Henderson for Board of Railroad Commissioners of the State of Iowa; *Henry C. Flannery* for Railroad and Warehouse Commission of the State of Minnesota; *Hugh McIndoe* and *C. B. Bee* for Public Service Commission of Missouri; *Thorne A. Browne* and *J. A. Little* for Nebraska State Railway Commission; *H. L. Bennett* for Corporation Commission of Oklahoma; *D. L. Kelley* and *John W. Raish* for Board of Railroad Commissioners of the State of South Dakota and South Dakota Department of Agriculture; and *John E. Benton* for the State commissions above named and Board of Railroad Commissioners of North Dakota, Public Service Commission of Louisiana, and National Association of Railway Commissioners.

C. B. Hutchings for American Farm Bureau Federation; *W. R. Scott*, *W. H. Fitzpatrick*, *J. A. Kuhn*, and *R. T. Willette* for Board of Trade of Kansas City, St. Joseph Grain Exchange, Atchison Board of Trade, and Omaha Grain Exchange; *C. V. Topping* and *E. H. Hogueland* for Southwestern Millers' League; and *C. T. Vandenover* for Southern Minnesota Mills, interveners.

W. F. Dickinson and *A. B. Enoch* for all defendants; *B. W. Scandrett*, *F. H. Dorety*, *R. J. Hagman*, and *A. H. Lossow* for Northern Pacific Railway Company, Great Northern Railway Company, and Minneapolis, St. Paul & Sault Ste. Marie Railway Company, defendants.

Report of the Commission.

By the Commission:

The complaint herein, filed by the Public Utilities Commission of Kansas, on behalf of all grain and hay shippers of that State, relates to the reasonableness and propriety of the level of interstate rates for the transportation of grain, grain products, and hay, in

carloads, between points in the territory embraced in the western group as defined in *Increased Rates, 1920*, 58 I. C. C., 220. While violations of sections 1 and 3 are alleged, no maladjustment in relationship between particular localities and markets is pointed out, and no particular description of traffic is stated as the recipient of an undue or unreasonable preference or advantage. Little evidence was offered to support a violation of section 3, and the complaint in that regard is not sustained.

Intervening petitions in support of the complaint were filed by the rate-regulating commissions of Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, Louisiana, and Oklahoma, and also by the American Farm Bureau Federation, Atchison Board of Trade, St. Joseph Grain Exchange, Omaha Grain Exchange, Kansas City Board of Trade, Southern Minnesota Mills, South Dakota Department of Agriculture, and Southwestern Millers' League. Complainant and interveners will be herein collectively referred to as complainants.

Several hearings have been held, an extensive and voluminous record has been made, and the case has been argued orally. The evidence deals largely with the broad agricultural and economic conditions which are said necessarily to prevail with considerable uniformity over great grain-and-hay producing areas cultivated under substantially like conditions, and which find price equalization in the same general markets.

As complainants' case is in large measure predicated on alleged disturbances of relationship between grain, grain products, and hay and other commodities caused by the horizontal percentage method of increasing and decreasing rates, we will give a brief résumé of such changes as are pertinent. A detailed statement of the general increases of recent years and their effect on the commodities named is contained in our decision in *Rates on Grain, Grain Products, and Hay*, 64 I. C. C., 85. By General Order No. 28 of the Director General of Railroads, effective June 25, 1918, commodity rates on wheat were increased 25 per cent, but not exceeding an increase of 6 cents per 100 pounds. Other grains, much of which theretofore had moved at rates lower than those contemporaneously effective on wheat, were by that order put upon the wheat-rate basis. The rates then in effect upon flour and other mill products were increased 25 per cent and not exceeding 6 cents per 100 pounds, but were required to be not less than the new rates on wheat. Rates on hay were increased 25 per cent. These increases applied alike to interstate and intrastate traffic.

Effective August 26, 1920, we permitted the defendants to increase their interstate rates on these and other commodities 35 per cent

within the western group. By various proceedings similar increases were made in the intrastate rates within the western group.

Our report in *Rates on Grain, Grain Products, and Hay*, *supra*, followed an exhaustive investigation into the interstate rates for the transportation of the same commodities which are here in issue, and the proceedings had thereunder were precipitated by the complainant in the instant case, which there, as here, filed a petition "on behalf of all grain and hay shippers" of Kansas, calling attention—

> to the exigencies of the hay and grain industries, and to suggest * * * the advisability, desirability, and necessity of prompt consideration of the matter of reduction in interstate freight rates on grain, grain products, and hay in the western group, with a view to affording relief commensurate with the needs of these industries.

That petition led to the investigation cited. In our report in that case made October 20, 1921, we found that the effective interstate rates on wheat and hay, in carloads, between points in the territory served by carriers in the western and mountain-Pacific groups as previously defined by us would be for the future unjust and unreasonable to the extent that they might individually include more than one-half of the increases authorized by us in the last-named proceeding. Thus reasonable maximum rates were found to be 117.5 per cent of the rates in effect immediately prior to the general increases of 1920. We also found that the then existing rates on coarse grain would be for the future unjust and unreasonable to the extent that they might exceed sums which were 10 per cent less than the rates prescribed as just and reasonable maximum rates on wheat from and to the same points. The rates on commodities recognized as products of wheat and coarse grain we found would be for the future unjust and unreasonable to the extent that they might exceed rates made by continuing the relationships then existing, except that where differentials were observed and were subjected to the percentage increases, the differentials should be reduced proportionately with the rates. An order was entered in accordance with our findings on November 21, 1921. Subsequently, upon petition of carriers operating in the western and mountain-Pacific groups the proceeding was reopened for further hearing on the question of the relationship of rates on wheat and other grains and the products thereof, between points in the whole western territory. So much of that proceeding as relates to this question is included in our report on further hearing of June 4, 1923, 80 I. C. C., 362.

In *Reduced Rates, 1922*, 68 I. C. C., 676, we required certain general reductions in freight rates and charges throughout the country. So far as it affects this case, we found that the existing freight rates and charges between points in the western group, with but few exceptions, were unreasonable to the extent that they included more

than 21.5 per cent over the rates in effect immediately prior to August 26, 1920. Among the excepted rates were those which resulted from our decision in *Rates on Grain, Grain Products, and Hay, supra.*

In our report in the last cited case we said:

> The petitioners have presented exhibits filed by the defendants in *National Live Stock Shippers' League* v. *A., T. & S. F. Ry. Co.*, 63 I. C. C., 107, showing the average haul and car-mile earnings of grain and various other commodities over the lines of certain representative carriers in the western group. * * * Without detailing the results of a study of these exhibits, it seems to be indicated that the earnings on grain traffic are relatively somewhat high.

We further said:

> We are to administer, and, so far as possible, give force and life to all the provisions of the interstate commerce act. Section 1 requires that no more than just and reasonable rates for transportation be exacted, and in determining what is just and reasonable it has always been recognized that, among other factors, not only the cost of the service, but its value to the user, must be considered.

Complainants refer to the foregoing excerpts from our report, and deduce that it was our intention thus to establish rates which would bear a proper relationship to the rates on other commodities. Starting with this deduction, they contend that our decision in *Reduced Rates, 1922, supra*, has resulted in a disturbance of the relationship as between the rates on grain, grain products, and hay, and other commodities, and has thereby replaced the burden upon the agricultural industry, which they assert our first action was intended to remove.

In the present proceeding we are asked to find that rates on wheat and hay within the western group are unreasonable to the extent that they include any part of the general increases authorized; that rates on coarse grains within the western group are unreasonable to the extent that they exceed 90 per cent of the rates found reasonable on wheat from and to the same points; and that rates on grain products are unreasonable to the extent that they exceed rates made by continuing the relationships that now exist.

We did not by our decision in *Rates on Grain, Grain Products, and Hay, supra*, intend to establish any fixed relationship between the rates on grain and its products and hay and all other commodities. We there prescribed reasonable maximum rates on these commodities, lower than the rates then in effect, on the record then before us. Subsequently, upon a broader record, which contained evidence relating to all commodities, *Reduced Rates, 1922, supra*, we found that reductions on other commodities should properly be made to the basis already stated. The question of whether grain, grain products, and

hay should participate in the reduction at that time was specifically raised, but upon the record we concluded that no further reduction could reasonably be made. If our first decision should be construed as fixing a relationship, our subsequent action must be given the same construction.

But entirely apart from the question of disturbed relationship complainants contend that the present rates on the commodities in issue are unreasonable both *per se* and relatively, and we will now consider this contention.

Here, as in *Rates on Grain, Grain Products, and Hay, supra*, complainants have placed great stress upon the economic and financial condition of the agricultural industry. In the last-named proceeding we referred at length to the distressing situation of the western farmers and to its underlying causes. Much of what was there said was applicable as of the date of the closing of the present record, as to portions, at least, of the western district. The agricultural industry in the West is still heavily mortgaged and deeply indebted to the banks. The labor and capital of the grain-and-hay farmer in parts of the western district receive a reward much lower than in any important gainful pursuit, and this at a time when many other industries have shaken off the depression and have made rapid and substantial strides toward recovery. In former reports we have alluded to the unusual period of readjustment which has followed in the wake of a world catastrophe. In this period of readjustment prices of agricultural products were among the first to be affected by a downward trend and were affected more violently and have continued on a low level for a longer period than most others. The record indicates, as of the time of submission, that agriculture had passed through the worst stages of the economic and financial depression, although recovery has been slow.

Complainants also contend that the financial condition of the farmer is reflected in the increasing number of business and bank failures in the agricultural regions and in the abandonment of farms that has taken place. Complainants insist that unless relief is granted other farms will be abandoned and production reduced, with consequent loss and suffering. There has been some reduction in the acreage devoted to farm products since 1919. From 1882 to 1919, with the exception of 1900, there was a uniform increase in the area of farm crops in Montana, North Dakota, and South Dakota until a maximum of 32,000,000 acres was reached. Since 1919 there has been a decline until 1922, when there were approximately 29,000,000 acres under cultivation in these three States. The record shows that the acreage under cultivation in Montana in 1922 was the same as in 1918; that the acreage in South Dakota is now

higher than ever before; and that the acreage in North Dakota is slightly less than the 1918 figure. On the whole, since our decision in *Rates on Grain, Grain Products, and Hay*, *supra*, there has been a slight decrease in acreage in these three States. The record is insufficient as to the situation in Minnesota, Iowa, Missouri, Nebraska, Kansas, and Oklahoma, so far as comparisons with pre-war years are concerned. It does, however, show that the reduction in grain acreage, 1922 under 1921, was less than 1 per cent in the five States of North Dakota, South Dakota, Montana, Wisconsin, and Minnesota. In each of these States the potato and hay acreage increased. Whether the reduction in wheat acreage will improve or impair the financial condition of the industry is not clearly developed. The reduction in acreage devoted to wheat, corn, and oats in 1922 under 1921 in the States of Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, and Kansas was apparently about 3 per cent. No figures were presented as to the other States in the western group.

The grain production in thousands of bushels in the eight States of Wisconsin, Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, and Kansas for the last three years is as follows:

Year.	Corn.	Oats.	Barley.	Rye.	Wheat.	Total.
1920	1,410,436	819,285	115,570	31,629	392,427	2,769,347
1921	1,314,954	587,211	88,195	33,491	365,946	2,389,797
1922	1,269,946	722,723	113,945	65,907	431,698	2,604,219

It will be noted that production of wheat and rye has increased, and that the total production of all grains in 1922 was somewhat higher than in 1921. In passing it may be said that the grain produced in 1922 in these eight States was 50 per cent of the production in the whole country.

Deflation has taken place in the agricultural industry. The high prices for farm products which prevailed during the war period were reflected in abnormally inflated land values. Many farmers, in reliance upon the stability of the then current prices for farm products, purchased or rented lands or otherwise assumed heavy obligations at the prevailing high prices. As long as prices for their products remained high they were able to carry the financial burden which they had assumed, but with price recession many have found it increasingly difficult to continue; others have given up the struggle. Most of the latter are located in what is termed marginal territory where, in addition to the long hauls to market, their crops are subjected to climatic hazards greater than in more desirable lo-

cations. The present record deals mainly with conditions in the marginal territory and that generally contiguous.

Evidence was received purporting to show the cost of production of wheat and other grains per bushel and per acre, in various sections of the territory involved. Variations in conditions and production make it manifestly impossible to arrive at any accurate cost figures for general application. In many instances the cost of production per bushel has probably exceeded the price per bushel which the farmer has received for his product. There has been, however, some improvement in the value of his commodities in 1922 over 1921.

The price of wheat, corn, and oats per bushel on December 1, 1922, and January 1, 1923, as shown by indices compiled by the Department of Agriculture, is contrasted below with prevailing price December 1, 1921, and January 1, 1922:

Date.	Wheat.	Corn.	Oats.
	Cents.	*Cents.*	*Cents.*
December 1, 1921	92.6	42.3	30.2
December 1, 1922	100.9	65.7	39.4
January 1, 1922	91.1	38.2	27.0
January 1, 1923	102.7	64.6	40.3

The average price of wheat and corn for the entire year of 1922 was somewhat lower than for 1921 because of the fact that farm prices did not reach their lowest level until the late summer and fall of 1921. The average price of the three cereals named for the five-year period 1911 to 1915, inclusive, was for wheat 89.3 cents; corn 65 cents, and oats 40.1 cents. The total value of the 1921 crop in Iowa, Minnesota, North Dakota, and South Dakota, was $740,654,429, and in 1922, $1,121,036,000, an increase of over 50 per cent.

The above figures for the four States named were calculated from the prices on December 1, 1921 and 1922. The prices on that date in 1921 were little above the lowest depth of the depression, so that a high percentage of increase in crop values does not necessarily indicate a profitable condition but it does show improvement since our report in *Rates on Grain, Grain Products, and Hay, supra.*

Complainants lay much stress upon the price relationship of farm products to the commodities which the farmer must buy, and to other nonagricultural commodities. Some of the latter are quoted at prices almost double those prevailing in 1913, but pay freight rates little higher, relatively, compared with their 1913 rates than do agricultural products, the wholesale price of which during 1922 averaged but 33 per cent higher than 1913 prices, although the total money value of farm products in the United States was 45 per cent higher in 1922 than in 1913. Examination of the Department of

Labor's index numbers of wholesale prices by groups, using 1913 as a basic, or 100 per cent year, shows that for the calendar year 1922 the index number for farm products was 133 as compared with an average of 149 on all commodities. For the first four months of 1923 the index numbers were 142 and 158, respectively. The index for farm prices of crops for 1922 was but 113. It is this price relationship situation that constitutes the foundation of complainants' contention that, taking into consideration the prices received by the farmer for his product, compared with prevailing prices on other commodities, agriculture is contributing more than its proportionate share to the maintenance of the transportation machine in the western group. Generally speaking, the present rates on the commodities in issue are on an average 45 per cent higher than the 1913 rates. Exhibits introduced by complainants showing the history of rates from typical wheat-shipping points in Kansas, Oklahoma, Missouri, Nebraska, South Dakota, and Iowa to adjacent markets show a somewhat higher percentage of increase in certain instances. If, however, short-haul and export rates are excluded the average is about as stated. The record is silent as to the rate situation in Wisconsin, Illinois, North Dakota, Texas, and such portions of Wyoming, Colorado, and Montana as are in this group. Rates on other commodities are approximately 52 per cent higher than the 1913 basis. Assuming that all rates were reduced by the exact amounts authorized by our decisions, those on wheat and hay are now 117.5 per cent of the rates in effect August 25, 1920, the date of the last general increase, on coarse grains 105.75 per cent, and on commodities generally 121.5 per cent. While we said in *Reduced Rates, 1922, supra*, that "the needs of commerce can not be met if rates are to fluctuate with market prices of commodities," this, of course, would not apply to any permanent or long-persistent shift of price levels. The element of value of a commodity and the principle of "what the traffic will bear" would be given due weight in such a case.

Summing up, it may be said that up to the time the case was submitted prices to the western farmer for his product had somewhat improved since our decision in *Rates on Grain, Grain Products, and Hay, supra*, and that he thus had more dollars with which to pay his debts. The purchasing power of his product had not, however, materially improved. On the whole, the record seemed to indicate a hopeful trend. The Secretary of Agriculture, in his annual report for 1922, said:

> Notwithstanding the continued low purchasing power of farm products, it is fair to say that in general the farmers of the United States are in a better position financially now than they were a year or 18 months ago. Farm products are selling at considerably higher prices, and it is estimated that the aggregate value of the crops in the country this year is about a billion and a quarter dollars more than last year.

The record indicates that the actual figure was about two billions of dollars. In the same report freight rates were mentioned as only one of many causes which contribute to the abnormal relationship of farm prices to the prices of things which the farmer must buy. Others were overproduction of many crops; maintenance of industrial wages at near war-time levels; economic depression and depreciated currency in European countries; interference with efficient functioning of necessary industries, by strikes, etc.; high costs of distribution of some farm products. An added burden to the agricultural industry is the tremendous increase in the taxes which the farmer must bear. The record shows that in the four States of Minnesota, North Dakota, South Dakota, and Montana there has been an increase in total taxation for State, county, city, and town purposes of over 100 per cent since 1916.

Removal of the remainder of the 1920 increases on wheat and a continuation of the 90 per cent basis on coarse grains, as requested by complainants, would mean an aggregate reduction of slightly more than 14 per cent in all grain rates in the western group, and, it is estimated, would take in revenue from the carriers approximately $17,000,000 to $20,000,000 annually. It is impossible to do more than estimate just what this would mean to the individual farmer. Obviously it would be more material to the farmer at a greater distance from market than to one who ships for shorter distances. In *Rates on Grain, Grain Products, and Hay, supra*, when the last reduction in these rates was made, we said:

> Based on the 1910 census it was calculated that the annual savings per farm would range in round figures from $10 to $50, dependent on the distance from market.

Assuming an average saving in freight charges of $50 per farm annually, it is inferable from a perusal of the farm prices of wheat, which during 1922 ranged from $0.88 to $1.21 per bushel, that such fluctuations from week to week and even from day to day are frequently just as important as a substantial change in freight rates. Reductions in freight rates from western farms to western primary markets alone will not solve the farmers' problem, while the effect on the carriers' revenues of the reduction sought would be serious to certain individual lines, unless other means of providing revenue or reducing expenses can be evolved to compensate them for the loss which would be sustained. There have been brought to our notice insistent claims that relief should be secured by reduction in the export rates. Grain and its products in 1922 constituted 28 per cent of the Minneapolis, St. Paul & Sault Ste. Marie Railroad's tonnage; 20 per cent of the Burlington's; 15 per cent of the Santa Fe's; and 14.5 per cent of the North Western's. Wheat alone constituted almost

50 per cent of all tonnage originating in North Dakota and shipped over the Great Northern.

The carriers have also presented many of the same arguments that were advanced in *Rates on Grain, Grain Products, and Hay, supra.* For example, they point to the excessive loss-and-damage claims on grain and grain products compared with other traffic, and to the special services, such as transit, accorded to this traffic on the basis of the through rates from point of origin to destination. They also claim that the improvement in the financial condition of the farmer is indicated by the record. They place their main reliance, however, upon their own financial circumstances, and upon the requirement of the law that we initiate, modify, establish, or adjust rates so that carriers as a whole or in designated rate groups will earn a fair return upon the aggregate value of the railway property held for and used in the service of transportation. The rate of return as fixed by us is shown as 5.75 per cent, and the 1922 return of carriers in the western group averages less than 4 per cent. For the first four months of 1923 the average was about 4.1 per cent. The subsequent and present rates of return are not in the present record as to the carriers in the group as a whole or as to particular carriers.

In all proceedings involving general reductions in rates, we have to look to the future and exercise our best judgment on the record before us. In former cases reductions and savings in carriers' operating expenses, present or in prospect, and prospective increases in tonnage were translated into reductions in rates. The situation which now confronts us is more difficult. In spite of the fact that the past year has been better than the average from the standpoint of tonnage handled, the revenues of the defendants are not shown on this record to have been excessive or in violation of law. In fact, as stated, carriers in the western group have been and are now earning considerably less than the prescribed return, and apparently less than the fair return to which they are entitled under their constitutional rights entirely independent of section 15a. If, as complainants contend, grain, grain products, and hay in the western group are now bearing more than their proportionate share of the transportation burden the inference is that other commodities are paying less than their fair share. The latter have not been pointed out. Seemingly, from the record, it is improbable that a reduction in the present rates on the commodities in issue would so increase the movement of these commodities as to enable the carriers to make up to any appreciable extent the loss in revenue should a general reduction in these rates be ordered. Of prime importance to the agricultural industry and to the country in gen-

eral is an adequate and efficient transportation service. The extent to which a marked rate reduction would disable the carriers generally or particular carriers in the performance of this service is of great consequence.

This record affords no basis even for a suggestion as to a reallocation of the transportation burden, nor could we in fairness to the shippers of other commodities make such readjustment without giving them opportunity to be heard. This is not to say that reductions in rates can in no case be made without contemporaneous increases if carriers are not making the prescribed return. If the usual tests of the reasonableness of rates, approved by experience and valid in law, show the basis as to any commodity to be too high it would be our duty under section 1 of the act to find such rates to be unreasonable. Many of the rates here assailed have been prescribed by us; others are depressed by competition of various kinds. So far as the usual tests of the reasonableness of rates shown by the record, other than perhaps the values of the commodities when viewed from the standpoint of existing prices, may be applied to the question before us, they do not indicate that the general basis of rates on the commodities here in issue is unreasonably high. The case has not been tried upon the theory that by comparison with rates upon the same commodities in other territories, or between analogous commodities in the same territory, or with reference to the earnings of the carriers under investigation, any reductions can or should be made. These comparisons, when properly made, we have found to be helpful. Upon the present record we would be led to conclude that the general basis of rates on grain, grain products, and hay within the western group has not been shown to be unjust, unreasonable, unduly prejudicial, or otherwise in violation of the interstate commerce act.

While this case has been before us under consideration since its submission, we have given careful study to the situation presented in the western group. It is desirable that the existing record should be supplemented by a showing as to the important changes in conditions which have since occurred, and as to the lack of changes if the permanency of trends is thereby made more manifest. It will also be helpful in the proper disposition of so important a matter if the usual tests in rate cases are applied so far as they are serviceable, and if the record is made to cover more comprehensively the situation over all of the territory affected instead of being so largely centered in a particular portion of it. The present and prospective financial and service needs of the carriers should also be developed. Without indicating views as to the final disposition of the matter, the case will be reopened and set for further hearing to give inter-

ested parties an opportunity to develop the foregoing and other pertinent matters. We will enter an order to that effect.

CAMPBELL, *Commissioner*, dissenting:

I am unable to agree with the majority that no relief can be granted upon the present record.

The majority base their decision upon the ground that the evidence in this case is largely a portrayal of economic conditions, but the fact that complainants lay particular stress upon the farmers' financial condition should not operate against them. The carriers, in the western group, it is true, are not earning the prescribed return of 5.75 per cent, but that should not necessarily deter us from reducing the rates on grain and grain products, for there is other traffic which contributes to the revenues of the carriers, and increases in the rates thereon may be justified. Furthermore, the duty cast upon us by section 15a does not constitute a guaranty to the carriers. *Rates on Grain, Grain Products, and Hay*, 64 I. C. C., 85, 99.

It is generally conceded that in the old days the carriers' only rule was that the rates should earn "all the traffic would bear." "What the traffic will reasonably bear" is still a controlling factor, and we always give it due weight. I think the carriers considered it proper to exact all that was possible to exact and still allow the traffic to move. I think we should consider it more from the viewpoint of what the industry can pay and still live. The evidence in this case is conclusive that wheat is being raised at a loss. It moves to market because it has to, but it moves at a great loss to the producer. Can the industry continue to function under present conditions? Clearly not. On the question of what the traffic can reasonably bear, numerous instances could be cited in which commodities having equal transportation characteristics have widely different rates, or having widely different characteristics have a common rate. For instance, in official classification territory fifth class applies on hay and on iron and steel. Hay generally loads to about 20,000 pounds per car, whereas the average loading of iron and steel is probably above 60,000 pounds. In other words, the car-mile earnings on a carload of steel are about three times what they are on a carload of hay, but the actual cost of hauling the iron and steel is not nearly so great as the difference in carload earnings would indicate. If the rating on hay were made high enough to yield per car earnings equal to those on iron and steel, most of the hay would probably not move. We permit import and export rates at low levels on certain commodities because that is necessary to create a movement.

Civilization can not exist without the farmer. The present wave of prosperity will not continue unless the farmer is prosperous. Can

there be a much more dire necessity for low rates than is shown in this case? To my mind the present record amply justifies the elimination of the balance of the 1920 increases as to grain and grain products. The carriers in the past have voluntarily reduced rates, many times, to meet real or fancied competition. That Congress meant for us to put a restraining hand on competition is evidenced by the power to fix minimum rates. Doubtless some of these rates have been reduced to an unduly low level and steps could be taken by the carrier to increase such rates to a proper level if it were found that the suggested reductions on grain and grain products would curtail their earnings to such an extent as to require increases in the rates on other traffic.

COMMISSIONER MCCHORD dissents.

COMMISSIONER MCMANAMY did not participate in the consideration or disposition of this case.

No. 15263[1]

IN THE MATTER OF RATES AND CHARGES ON GRAIN AND GRAIN PRODUCTS

Submitted March 22, 1924. Decided July 10, 1924

1. The present record necessitates no change in the basis of approximate value for rate-making purposes in the western district adopted by the commission in 1920 and reviewed in 1922.
2. Whether or not expenditures for maintenance of equipment in 1923 were to some extent abnormal, the conclusion is not warranted that the earnings of carriers in the western district were in excess of a fair return.
3. Upon the record, and applying the usual tests, the general basis of rates of carriers subject to the interstate commerce act for the transportation of grain, grain products, and hay in interstate or foreign commerce does not appear to be unreasonable or otherwise in violation of the interstate commerce act.
4. Complaint in No. 14393 dismissed, and proceeding of investigation in No. 15263 discontinued.

Clyde M. Reed and *P. A. Conway* for complainant in No. 14393.

J. H. Henderson, *W. F. Parsons*, and *Walter Condran* for Board of Railroad Commissioners of State of Iowa; *Victor E. Anderson*, *O. P. B. Jacobson*, *Frank W. Matson*, *Ernest C. Carman*, and *Henry C. Flannery* for Railroad and Warehouse Commission of State of Minnesota; *Hugh McIndoe*, *V. E. Smart*, *R. H. Musser*, and *C. B. Bee* for Public Service Commission of Missouri; *Thorne A. Browne* and *J. A. Little* for Nebraska State Railway Commission; *Paul A. Walker*, *C. B. Bee*, and *H. L. Bennett* for Corporation Commission of Oklahoma; *H. M. Slater* for Illinois Commerce Commission; *R. L. Dillman*, *D. L. Kelley*, *J. J. Murphy*, and *John W. Raish* for Board of Railroad Commissioners of State of South Dakota and South Dakota Department of Agriculture; *Frank Milhollan*, *John Thorpe*, and *John N. Hagan* for Board of Railroad Commissioners of North Dakota; *John E. Benton* for the State commissions above named, Public Service Commission of Louisiana, and National Association of Railway Commissioners.

C. E. Hutchings and *O. W. Sandberg* for American Farm Bureau Federation; *W. R. Scott*, *W. H. Fitzpatrick*, *J. A. Kuhn*, and *R. T. Willette* for Board of Trade of Kansas City, St. Joseph Grain Ex-

[1] This report also embraces No. 14393, Kansas Public Utilities Commission *v.* Atchison, Topeka & Santa Fe Railway Company et al.

change, Atchison Board of Trade, and Omaha Grain Exchange; *T. A. Durrant* for Commercial Club of Grand Forks, N. Dak.; *G. E. Peterson* for Commercial Club of Fargo; *P. A. Lee* for Farmers Grain Dealers Association of North Dakota; *J. A. Milbourne* for Excello Feed Milling Company of St. Joseph; *C. V. Topping* and *E. H. Hogueland* for Southwestern Millers' League; *Chas. W. Anderson* for Commerce Club of St. Joseph, Mo.; *E. H. Tipton* for Board of Trade of Kansas City; *J. H. Tedrow* for Kansas City Chamber of Commerce; *C. J. Kucera* for Kansas City Millers Club and Kansas City Flour & Feed Club; *J. F. Coupe* for Iowa Farm Bureau Federation; *H. J. Sims* for National Hay Association; *G. H. Work* for Colorado Milling & Elevator Company; *A. D. Stevens* for Illinois Farmers Grain Dealers Association; *C. B. Rader* for Denver Grain Exchange Association; and *C. T. Vandenover* for Southern Minnesota Mills, interveners in No. 14393.

L. E. Banta for Indianapolis Board of Trade; *Walter E. Miller* for himself and others as owners of railroad securities; *J. S. Brown* for Chicago Board of Trade; *Jeffery, Campbell & Clark* and *James C. Jeffery* for Millers National Federation; *J. D. Shatford* for stockholders of northwestern roads; *Richard I. Manning* for Land Settlement Commission of South Carolina and Farmers of South Carolina and the South unofficially; *Hugh MacRae* for agricultural interests of North Carolina unofficially; *Thos. D. Guthrie* for Jacksonville Traffic Bureau, Incorporated; *J. K. Moore* for Oklahoma Traffic Association; *James C. Suttie* for Omaha Hay Exchange and National Hay Association; *Carl Giessow* and *Edgar Moulton* for New Orleans Joint Traffic Bureau; *I. H. Van Winkle, Wm. P. Ellis,* and *Hal F. Wiggins* for Public Service Commission of Oregon; *J. M. Thompson* and *Samuel E. Newton* for Public Utilities Commission of Idaho; *Hugh Gordon* and *W. P. Geary* for Railroad Commission of California; *O. O. Calderhead* for Department of Public Works of Washington; *Amos A. Betts* for Arizona Corporation Commission; *Joseph N. Teal* and *William C. McCulloch* for Portland Chamber of Commerce and Portland Traffic & Transportation Association; *W. P. LaRoche* and *H. L. Hudson* for Commission of Public Docks, Portland, Oreg., and port of Portland, (Oreg.); *J. E. Trimble* for Whitman County Farmers' Union and Garfield Union Warehouse Company of Garfield, Wash.; *John H. Dunbar* and *Raymond W. Clifford* for grain growers and other interested parties; *R. D. Lytle* for North Pacific Millers Association; *Frederick Steiwer* for Umatilla County Farm Bureau; *L. A. Hunt* for Northwest Hay Association; *H. P. Christenson* for Northwest Wheat Growers Associated; *Walter J. Robinson* for Northwest Wheat Growers Associated, Pomeroy Farmers Union, and Pomeroy Com-

mercial Club; *F. L. Finkenstaedt* for Waccamau Lumber Company; *N. E. Storr* for Los Angeles hay dealers; *E. W. Hollingsworth*, *R. T. Boyd*, and *Bishop & Bahler* for Oakland Chamber of Commerce; *Seth Mann* for San Francisco Chamber of Commerce; *C. S. Connolly* for Albers Brothers Milling Company; *H. M. Brandt* of Manhattan, Kans., for himself; *E. L. French* for Departments of Agriculture of Washington and Oregon; *Jones, Blaine & Jones* for Arizona Hay Traffic Association; *Roland Johnston* for Phoenix Chamber of Commerce; *Chas. E. Cotterell* for Alabama Public Service Commission, Alabama Farm Bureau Federation, and Transportation Bureau, Montgomery Chamber of Commerce; *J. H. Alldredge* for Alabama Public Service Commission.

W. F. Dickinson, *T. J. Norton*, *A. B. Enoch*, *B. W. Scandrett*, *F. G. Dorety*, *R. J. Hagman*, *D. F. Lyons*, *A. H. Larimore*, and *A. H. Lossow* for all defendants in No. 14393 and for all respondents in western district; *L. H. Strasser* for Wabash Railway Company; *Silas H. Strawn* and *Frank H. Towner* for Chicago & Alton Railroad; *Fred H. Wood* and *C. W. Owen* for Southern Pacific lines of Texas; *L. S. Cass* and *J. A. Streyer* for American Short Line Railroad Association; *H. M. Pearce* for Chicago, St. Paul, Minneapolis & Omaha Railway; *Paul P. Farrens* for Southern Pacific Company; *W. A. Robbins* for Oregon-Washington Railroad & Navigation Company, Oregon Short Line, Union Pacific Railroad, and Los Angeles & Salt Lake Railroad Company; *O. P. Kellogg* and *A. J. Laughon* for Chicago, Milwaukee & St. Paul Railway Company; *H. W. Klein* and *J. E. Lyons* for El Paso Southwestern system, Arizona Eastern Railroad Company, and Southern Pacific Company; *Sanborn, Roehl & Smith* for Sacramento Northern Railroad, San Francisco-Sacramento Railroad, Central California Traction Company, Petaluma & Santa Rosa Railroad, Nevada-California-Oregon Railroad, California Western Railroad & Navigation Company, respondents, Bay & River Boat Owners Association, Sacramento Navigation Company, Island Transportation Company, Steamboat Owners Association of California, interveners, Western Pacific Railroad Company, San Francisco, Napa & Calistoga Railway, Central Traction Company, Bay Point & Clayton Railway Company, Pajaro Valley Railway Company; *Clarence M. Oddie* for American Short Line Railroad Association, Santa Maria Valley Railroad, and Pacific Coast Railway; *E. W. Camp* and *A. M. Reinhardt* for Atchison, Topeka & Santa Fe Railway Company and Sunset Railroad Company; *Frank Karr* and *George F. Squires* for Pacific Electric Railway Company and Visalia Electric Railroad Company; *Elmer Westlake* and *E. J. Fenchurch* for Southern Pacific Company; *G. P. Bullard* and *E. J. Fenchurch* for Arizona Eastern Railroad Company; *B. F. Seggerson* for El Paso & Southwestern system.

N. W. Proctor, J. G. Kerr, C. J. Rixey, H. L. Walker, J. L. Lovorn, L. E. Smith, O. H. Anderson, F. G. Hamblen, C. D. Bailey, J. A. McNeill, J. T. Taylor, H. F. Smith, E. H. Shaw, J. L. Shoppard, R. V. Fletcher, Chas. T. Airey, D. F. Kirkpatrick, C. L. Senter, R. C. Hicks, Charles E. Gay, jr., Henry Thurtell, B. L. Bugg, J. L. Edwards, Jas. A. Perry, W. R. McDonald, E. M. Price, C. W. Peacock, J. R. Hackett, and *R. L. Mobley* for various respondents in the southern group.

N. S. Brown, L. H. Strasser, M. B. Pierce, H. S. Harr, D. P. Connell, James Stillwell, F. H. Towner, Francis I. Gowen, Parker McCollester, W. A. Cole, and *James W. Carmalt* for various respondents in the eastern group, and *Oliver P. Caldwell* for Luckenbach Steamship Company, Incorporated.

REPORT OF THE COMMISSION

AITCHISON, *Commissioner*:

This proceeding, No. 15263, was instituted upon our own motion to determine to what extent, if any, the rates, charges, regulations, and practices of carriers subject to the interstate commerce act, in respect of the transportation of grain and grain products in interstate or foreign commerce, are or for the future will be unjust, unreasonable, or otherwise unlawful, and, if so found, to prescribe just, reasonable, and lawful rates, charges, regulations, and practices thereafter to be observed. Subsequently the scope of the investigation was broadened to include in like manner the commodity hay.

A copy of our order instituting this investigation was served upon all common carriers by rail, or by water, or by rail and water, subject to the interstate commerce act, upon the Governor of each State, and upon the tribunal in each State having regulatory powers over common carriers. General notice was given to shippers and to the public. In addition, a copy of our order was served upon the parties in No. 14393, wherein the complainant, the Public Utilities Commission of Kansas, on behalf of all grain and hay shippers of that State, assailed the reasonableness and propriety of the present level of interstate rates for the transportation of grain, grain products, and hay, in carloads, between points in the territory embraced in the western group as defined in *Increased Rates, 1920*, 58 I. C. C. 220. A hearing had been previously held in this complaint proceeding. In our report thereon, *Kansas Public Utilities Com. v. A., T. & S. F. Ry. Co.*, 83 I. C. C. 105, 115, issued October 11, 1923, hereinafter called the *Kansas case*, we said:

> Upon the present record we would be led to conclude that the general basis of rates on grain, grain products, and hay within the western group has not been shown to be unjust, unreasonable, unduly prejudicial, or otherwise in violation of the interstate commerce act.

While this case has been before us under consideration since its submission, we have given careful study to the situation presented in the western group. It is desirable that the existing record should be supplemented by a showing as to the important changes in conditions which have since occurred, and as to the lack of changes if the permanency of trends is thereby made more manifest. It will also be helpful in the proper disposition of so important a matter if the usual tests in rate cases are applied so far as they are serviceable, and if the record is made to cover more comprehensively the situation over all of the territory affected instead of being so largely centered in a particular portion of it. The present and prospective financial and service needs of the carriers should also be developed. Without indicating views as to the final disposition of the matter, the case will be reopened and set for further hearing to give interested parties an opportunity to develop the foregoing and other pertinent matters.

An order reopening the *Kansas case* for further hearing was entered simultaneously with our order of investigation in No. 15263. The issues in the *Kansas case* are practically coextensive with the inquiry comprehended by the general investigation so far as the last-named proceeding relates to the western group. The record in No. 14393 was by stipulation made a part of the record in No. 15263; the two cases were heard and argued together, and will be disposed of in one report.

In addition to interveners named in our report in the *Kansas case*, the National Hay Association, the Chamber of Commerce of Kansas City, Mo., Kansas City Millers' Club, Kansas City Flour & Feed Club, the Denver Grain Exchange, the Commercial Club of Grand Forks, N. Dak., the Commercial Club of Fargo, N. Dak., the Farmers' Grain Dealers' Association of North Dakota, the Excello Feed Milling Company, the Commerce Club of St. Joseph, Mo., the Iowa Farm Bureau Federation, and the Illinois Farmers' Grain Dealers' Association have now intervened in Docket No. 14393. All those advocating reductions will be herein collectively referred to as complainants.

Hearings in these proceedings were arranged to permit parties in each of the four rate groups to be heard at a point or points within its limits. The record is voluminous and extensive. All parties have had full opportunity to be heard. The situation as to each group will be treated separately.

WESTERN GROUP

GENERAL BASIS OF RATES NOW IN EFFECT

A detailed statement of the general increases and reductions of recent years, and their effect on the commodities here considered, appears in our decisions in *Rates on Grain, Grain Products, and Hay*, 64 I. C. C. 85, and in the *Kansas case*, *supra*. Generally stated, the rates on wheat and its products, as well as hay, in this group

are now 117.5 per cent, the rates on coarse grains 105.75 per cent, and the rates on all other commodities 121.5 per cent of the corresponding rates in effect at the end of Federal control. Compared with the pre-war period, the rates on wheat, its products, and coarse grains are now generally about 45 per cent above the rates then in effect. In reaching this percentage we have given consideration to the 6-cent maximum increase made under General Order No. 28. The rates on hay are about 47 per cent above the pre-war level. Rates on other commodities stand on a level 52 per cent higher than pre-war. The last-named figure would be affected slightly by such reductions in rates on individual commodities as have occurred since the general reductions of 1922.

CONTENTIONS

Complainants contend that the portion of the agricultural industry which is mainly concerned with the production of grain and hay, is contributing disproportionately to the revenue necessary to maintain the transportation machine in this group, when we consider the present relative price level of grain, its products, and hay shipped in interstate or foreign commerce. Respondents, on their part, defend the rates assailed as being just and reasonable, and assert that they have as yet not made the return determined by us as fair.

RELIEF ASKED

Complainants ask not only that the remainder of the increases authorized by us in 1920 be removed throughout the western group, but also that existing differentials between wheat and coarse grains be maintained. This would mean a reduction in present rates of over 14 per cent. In our report in the *Kansas case*, *supra*, at page 113, it was estimated that this would take in revenue from the carriers in the western group approximately $17,000,000 to $20,000,000 annually.

ALLEGED OVERVALUATION OF CARRIERS FOR RATE-MAKING PURPOSES IN WESTERN DISTRICT

Complainants in the *Kansas case* urge that "reductions in rates on grain applicable in the western group are in harmony with the purpose of section 15a of the transportation act when certain [illegible]mal expenditures of the year 1923 are considered and the true [illegible]rnings of that period are applied to the fair value of property of carriers in the western group." A basic consideration, therefore, is the fair value of the property of carriers in the western group. Many of

the respondents are in and serve both the western and mountain-Pacific groups, which together will be referred to as the western district.

In support of these contentions the complainants presented two exhibits. One was compiled from data published by the presidents' conference committee on valuation of the Association of Railway Executives, as to certain basic figures from tentative valuations of railroads adopted and served as such by us. This exhibit purported to show, as to 151 carriers in the western district (which includes the western group and mountain-Pacific group), the relationship between the aggregate of the tentative final valuations found by us in that district and the recorded amounts in the accounts of investment in road and equipment of the same carriers. The exhibit also set forth the par value of the stock on valuation date, and the capitalized debt. The tentative valuations were as of various dates, from 1914 to 1918. The exhibit undertook to bring the investment in road and equipment from the valuation dates to December 31, 1919, by taking into account the increment in the road and equipment or property investment shown in the annual reports to the commission or in various recognized statistical publications.

The roads taken were subdivided as follows: Class I, 19; Class II, 40; Class III, 57; terminal, 17; electric, 1; no class, 17; total 151. The witness stated that the aggregate of the tentative final valuations of these lines amounted to 78.19 per cent of the aggregate of the investment in road and equipment of the same carriers on the respective valuation dates, as stated in the books of the carriers.

In another exhibit the percentage so deduced, 78.19 per cent, was applied to the book value, $8,818,454,872, of the roads in the western district, and the result, $6,895,149,864, was stated as "value for rate-making purposes as of December 31, 1919." On this exhibit is based complainants' claim that reductions in rates on grain applicable in the western group are in harmony with the purpose of section 15a of the act, when the true net earnings are applied to the fair value of the property of carriers in the western group.

The exhibit as originally submitted and received did not take account of additions and betterments subsequent to December 31, 1919, which the carriers claim amounted to approximately $700,000,000. Adding that amount to the deduced value, $6,895,149,864, complainants in their brief state a value for rate-making purposes as of December 31, 1923, of $7,595,149,864. A return of 5.75 per cent on this amount is $436,741,116. It was seemingly accepted that the net return for the first nine months of the calendar year should be 68.9 per cent of the year's income. Applied to the value last stated this would give $300,900,848 as the theoretical 5.75 per cent

return, on the basis of the aggregate value put forward by complainants. The net return for the first nine months was in fact $245,545,800.

To the last-named amount the complainants add "two-thirds of alleged excess maintenance charges against nine months' operation, year 1923," $53,922,526, and show an adjusted net operating income for the first nine months of 1923 of $299,468,326, which is a rate of return of 5.72 per cent on the value as of December 31, 1923, computed by them as above stated.

In determining whether this evidence is sufficient to cast serious doubt upon the validity of the values found as approximations in *Increased Rates, 1920, supra*, and followed in *Reduced Rates, 1922*, 68 I. C. C. 676, two questions are presented: (1) Whether the method pursued by complainants is sound; and (2) whether the data to which the method is applied were sufficient. In testing this evidence, broadly stated by complainants as merely casting a doubt and as not probative, obviously we are not confined to the record, but may inform ourselves in any way open under section 15a to enable us to determine whether the doubt cast upon our previous decisions is substantial or not. In *Increased Rates, 1920, supra*, page 228, we stated the method which we had employed in arriving at values in the various groups:

> While the valuation of the railroads under section 19a of the interstate commerce act is still incomplete, the work has progressed so far that the results are of value and informative in reaching the determination we are now required to make. So far as the work has produced results, either as to particular roads, or as showing general tendencies and principles, we have given consideration thereto. As will appear from examination of our various valuation reports, and from section 19a itself, our investigations under that section are designed to give information as to the original cost of the property, the cost of reproduction new, the accrued depreciation, the amount of the investment, the corporate histories of the properties, the values of the lands, and other values and elements of value, if any.
>
> We have also before us the investment accounts of the carriers. Since 1907 there have been mandatory regulations by us as to the manner in which the investment accounts should be kept. In the administration of section 20 of the interstate commerce act we have had frequent occasion to investigate, and in many cases to correct, errors apparent in the investment accounts; other errors have been discovered and brought to our attention in the progress of the work of valuation under section 19a.
>
> The probable earning capacity of the properties under particular rates prescribed by law and the sums required to meet operating expenses, separately and collectively, are indicated in the record.
>
> There is also evidence which tends to show the amount and market value of the bonds and stocks of the carriers.
>
> In properly appraising all these elements of value we are mindful of the fact that the carriers are operating units and going concerns. This fact has been given due consideration in the light of the financial history of the transportation system of the United States, as developed by the record and as

known to us. The needs for working capital and materials and supplies on hand have been considered and allowance therefor has been made.

From a consideration of all of the facts and matters of record, and those which, under section 15a of the interstate commerce act, we are both required and authorized to consider, we find that the value of the steam-railway property of the carriers subject to the act held for and used in the service of transportation is, for the purposes of this particular case, to be taken as approximately the following:

Eastern group, as defined by the carriers	$8,800,000,000
Southern group, as defined by the carriers	2,000,000,000
Western group, as defined by the carriers, including both the Western and Mountain-Pacific groups herein designated	8,100,000,000
Total	18,900,000,000

We did not find it practicable to apportion the aggregate values of the properties in the western group so as to show the values in the western and mountain-Pacific groups separately.

The subject was again examined by us in *Reduced Rates, 1922, supra.* We then stated, page 684:

In the instant proceeding there is little of record which goes directly to the subject of value. There has been a general acceptance by carriers and shippers of the value taken in our former determination as an appropriate basis for the purposes of the present proceeding. The respondent carriers have not attempted to show that that value should be increased, other than by appropriate consideration of the subsequent increments to the transportation plant. We have before us deductions made by certain of the State commissions and shippers, based upon the results of the valuation work under section 19a of the interstate commerce act so far as announced, and also computations based upon the market value of outstanding stocks and bonds.

More than 20 months have passed since our former determination, and in that period the valuation of the railroads under section 19a has gone forward. The work is still incomplete, but has progressed to such an extent that we may accept the results with fuller assurance, both as to particular roads and as showing general trends and principles. In our administration of various sections of the act, and in our certification of standard return for the purposes of the Federal control act, we have had occasion to make further investigation and corrections of investment accounts of the carriers.

The various other values and elements of value, as set forth in *Increased Rates, 1920, supra*, pages 228–229, have been reexamined in the light of the present record and the requirements of section 15a. We find no present reason to disturb the value taken by us in that proceeding as approximating the sums there stated, except to the extent that subsequent additions to or withdrawals from the property in service, including materials and supplies and working capital, and further depreciation, make adjustment necessary. Whether the value taken by us is 1920 should stand without consideration of these later items or not, the difference would be reflected only in fractions of per cents of the returns hereinafter indicated as the results of operation.

An analysis of complainants' exhibits is desirable. For convenience, it has been put in tabular form. Some of the criticisms which follow doubtless grow out of the fact that the complainants did not have

access to complete data. First, it will be noted that working capital, including materials and supplies, was not taken into account by the complainants, except as those amounts might be reflected indirectly by the ratios used as applied to book value. This is an omission which should be corrected. The method employed automatically scales down additions and betterments made recently, even those put in by the Government during the period of Federal control.

The tabular analysis follows:

Item		Amount
1. The exhibit shows "tentative final valuation of I. C. C.—Property owned used and not used" of 151 carriers		$1,277,307,418
2. Deduct therefrom the sums shown in the same tentative valuations for materials and supplies ($18,825,476)		
And for working capital (cash on hand $18,752,677)		
Aggregating		37,578,153
3. Remainder, representing final value of road and equipment		1,239,729,265
(Note.—The following are the $10,000,000 value roads included in the foregoing. Materials and supplies and working capital are deducted in stating the values.)		
Kansas City Southern system	$48,064,048	
San Pedro, Los Angeles & Salt Lake	43,611,225	
Western Pacific	65,514,739	
St. Louis Southwestern of Texas	22,850,009	
St. Louis Southwestern Railway	25,575,500	
Arizona Eastern	11,725,000	
Louisiana Railway & Navigation Co	10,560,000	
Oregon Trunk Railway	15,000,000	
Duluth, South Shore & Atlantic	17,500,185	
Chicago, Rock Island & Pacific system	318,538,996	
Great Northern Railway	385,111,986	
Oregon-Washington Railway & Navigation Co	133,557,514	
Total for 12 carriers named, 88.5 per cent of $1,239,729,265 (item 3)	1,097,609,202	
Total for 3 largest carriers named, 67.5 per cent of $1,239,729,265 (item 3)	837,208,496	
Total for Rock Island & Great Northern systems, 56.8 per cent of $1,239,729,265 (item 3)	703,650,982	
4. Investment in road and equipment for the 151 named carriers is stated by those carriers as		1,633,450,576
5. The deduction made in the exhibit is that "the percentage of total final value to total investment in road and equipment as shown by the carriers' books" is 78.19 per cent of the latter, or item 4.		
6. To obtain comparable items, the sums for materials and supplies (item 2 above) should be deducted from the tentative final valuation totals (item 1 above), and the ratio of item 4 above obtained to item 3 instead of to item 1. Item 3 is 75.89 per cent of item 4.		
7. The ratio shown in item 5 is applied to the recorded investment stated in *Increased Rates, 1920*, 58 I. C. C., at page 228, for the western group, $8,818,454,872, and a valuation for rate-making purposes as of December 31, 1919, including working capital and materials and supplies, is deduced of		6,693,149,86
8. However, the valuations used in the statement of 151 roads, with the exception of 8 minor roads, aggregating only about $2,000,000, are all valued as of 1917 or years preceding.		
The Rock Island, Great Northern, and Oregon-Washington, aggregating about 67 per cent of the total, were valued as of 1915; and the Kansas City Southern, San Pedro, Western Pacific, aggregating 12.5 per cent of the total, were valued as of 1914. Applying the ratios determined by a study of aggregates, for which June 30, 1916, may be taken as the weighted mean to determine values as of a period two years later than the latest date employed in determining the ratio, and three years later than the mean of the valuation dates, automatically writes off nearly one-quarter of all sums expended for additions and betterments from the middle of 1916 to the end of 1919, although nearly all such expenditures were made by the Government itself, through the President, during the period of Federal control, and were subject to the scrutiny of the director general, the commission, the corporate carriers against whose accounts they were charged, and were subject to adjustment by referees or the Court of Claims. The method employed automatically reduced additions in cash or materials and supplies brought in, by like amounts. Per contra, it automatically fails to take full account of retirements.		
9. The total of investment, in road and equipment accounts for the western district as of December 31, 1917, was		8,571,155,639

Item	Amount
10. Applying the ratio shown in item 6, 75.89 per cent, to the total of the road and equipment accounts as of December 31, 1917, gives as the deduced final value as of that date for the roads in the western district, not including working capital or materials and supplies	$5,504,650,011
Note.—This computation is somewhat low, for the reasons stated in item 8 above, inasmuch as it writes down the investments made from valuation dates, respectively, to December 31, 1917. If June 30, 1916, be taken as a weighted mean date for the 151 appraisals, then for the roads in the western district this item might well be increased by the amount of additions and betterments to individual roads in the western district to the end of 1917. These increments were all taken into account in the computations made in *Increased Rates, 1920*.	
11. The net additions to the property investment accounts of roads in the western district during 1918 and 1919 aggregated	201,508,556
12. The total of items 10 and 11 would indicate a value as of December 31, 1919, for road and equipment, computed in the manner indicated, of	6,706,158,569
13. Materials and supplies of the roads in the western district, as of December 31, 1919, amounted to	234,940,106
14. Cash on hand, December 31, 1917, taken as normal for western carriers (the roads in 1919 being in the hands of the director general)	158,539,713
15. Total value as of December 31, 1919, western district, on basis of ratio of final value of 151 roads to book value, plus actual net increment in book costs, plus actual materials and supplies, and normal cash (items 12, 13, and 14 aggregated)	7,099,638,388

Merely correcting the value assumed in the "modified exhibit" set out in the complainants' brief, by substituting $7,099,638,388 for $6,895,149,864 and adding $700,000,000, additions and betterments since December 31, 1919, the "value for rate-making purposes as of December 31, 1923" becomes $7,799,638,388. A return of 5.75 per cent on the latter amount is $448,479,207, on an annual basis. For the first nine months of the year, taken at 68.9 per cent of year's income, $309,002,174 should be earned to accord the return on the value named at the annual rate of 5.75 per cent. The "net return for nine months" was $245,545,800, or at the annual rate of 4.56 per cent. If "two-thirds of excess maintenance charges against nine months' operation, year 1923, $[illegible]22,526," is taken into account as a part of the true net return for the nine months' period, as claimed by the complainants, so that the true return for the nine months was $299,468,326, the rate of return on value as of December 31, 1923, becomes 5.57 per cent per annum, instead of 5.72 per cent, as claimed in the "modified exhibit." Making the corrections previously indicated as necessary, it is apparent that even accepting the complainants' figures as to net income for the nine months' period, and assuming the soundness of their contention as to excess valuation and excess maintenance charges during the year, the return was below that found by us to be reasonable, and any further reduction in revenue would increase the shortage in the fair return of the carriers in the western group.

As shown by the monthly reports of the carriers, the net railway operating income of the Class I roads for the western district was $374,461,384 in 1923. The returns for the smaller carriers are not yet available in their entirety. Based on past experience, it is not far amiss to assume that the net railway operating income of the Class I roads will be 98.36 per cent of the total for all roads in the district.

Making this assumption, the total net railway operating income of the roads in that district in 1923 may be taken as approximately $380,704,000, equivalent to 4.88 per cent on the value submitted by complainants, as revised. As the alleged excess maintenance charged amounts to $80,883,791, two-thirds of which complainants claim should be amortized over the following two years, the return shown would be increased by 0.69 per cent, giving a return of 5.47 per cent for the entire year 1923 if the claim of the complainants in this regard should be accepted in full.

Whether the results obtained by the method employed by complainants can be followed here must depend also upon whether the data used may be considered as sufficiently comprehensive and representative. The complainants exercised no selection as to roads, inasmuch as they took all of the announced tentative valuations in the order as they were approved for service, and no criticism is therefore implied that unrepresentative roads were taken. But results obtained from a study of these 151 properties are dominated by the characteristics of the Great Northern, the Oregon-Washington Railroad & Navigation Company, and the Rock Island systems. The tentative final value found for these three dominating roads is 98 per cent of the aggregate book investment on the valuation date. The tentative final values of the other roads, 148 in number, appearing in the exhibit, are but 55.3 per cent of the book investment on valuation date.

The exhibit tends to show that the final valuation of the stronger and larger roads more nearly approximates the book value than is the case with the weaker and smaller roads. In other words, there is much more inflation in the book values of the smaller roads than in the case of the larger roads used in compiling the exhibit. In the progress of our valuation work a proportionately greater number of small roads have advanced to the tentative valuation stage than the larger roads. Thus, as has been previously pointed out, the inflation of the investment account of the smaller carriers has reflected itself conspicuously in a lower ratio found in the exhibit than a normal course would indicate as proper.

The absence of important carriers such as the Santa Fe, Chicago & North Western, Burlington, Northern Pacific, Milwaukee, Missouri Pacific, Great Western, Minneapolis & St. Louis, Missouri-Kansas-Texas, Union Pacific, Frisco, Soo Line, Oregon Short Line, Denver & Rio Grande Western, Southern Pacific, and Western Pacific minimizes the criticism inferable from complainants' exhibit.

In *Reduced Rates, 1922*, *supra*, we reexamined our available valuation information, and made an attempt to utilize the results of our investigation under section 19a of the act in so far as deemed by us

to be available, as directed in terms by section 15a. It may be helpful to contrast such data with what was available to us in *Increased Rates, 1920*. While in 1922 the work of valuation was still incomplete, the results were much more informative and dependable as showing aggregates and general tendencies than when we made our former determination. This is because a far greater amount of basic material was at hand from which deductions could be made as to the whole. We were able to speak with greater confidence as to much more of the property, and needed to make deductions to a correspondingly lesser amount. The progress of the work enabled us to select more roads in which we had at least all three of the underlying reports—land, engineering, accounting.

The following general sources of information derived from the investigation under section 19a were deemed to be available, as that term was used in the statute.

1. Tentative valuations showing a final value, which have been approved for service and have been served by the commission upon the carriers, the States, and the Attorney General of the United States. As to many of these there are protests by the carriers, and in some cases by the States, which are yet to be heard. In many cases no protest had been filed, and the value tentatively fixed is final or will become so when an appropriate order has been entered by the commission. In these cases, the amount so stated must, under the terms of section 15a, be used. This information is substantially that compiled by the presidents' conference committee, and used by complainants as the basis for their computation.

2. Preliminary reports by our Bureau of Valuation sufficiently complete to be furnished by it to the carriers for their criticism, as to which the three underlying reports have been completed. In certain of these cases, tentative valuation reports had been drafted, but had not yet been served. Of 137,766.45 miles of road in the western and mountain-Pacific groups, data were available as to approximately 43 per cent.

The results obtained by a study of the available information procured under section 19a of the act were brought to a common date by appropriate consideration of increments or reductions in investment due to extensions or new lines, additions and betterments, retirements, changes in depreciation reserves, and in working capital, including materials and supplies. Our general conclusions in *Reduced Rates, 1922, supra*, have already been quoted. Briefly, they were that, except as such readjustments were indicated to be necessary, we there found no reason to disturb the value previously taken in *Increased Rates, 1920, supra*, as approximating the sums there stated.

The question arises as to what extent the roads included in our 1922 study were representative. While numerically not as many roads of all classes were studied by us in 1922 as were employed in compiling complainants' exhibit, many more representative important carriers were included. Roughly, for every 100 miles of Class I roads represented in complainants' exhibit, our study in *Reduced Rates, 1922, supra*, covered the same mileage and 135 miles in addition. Multiple-track carriers were not as fully represented in either study as those of relatively more simple characteristics.

We had before us other matters which could not be touched upon or given weight in complainants' exhibit, such as the corrections which had been made by us in the investment accounts, the amount of accrued depreciation as carried on the books of the carriers, the actual amounts of working capital on hand, including materials and supplies, the capitalization of standard return or compensation, the amounts of stocks and bonds outstanding, and estimates of the market value of portions thereof.

As between these two estimates the one based upon a larger proportion of the important individual roads in the class is more likely to be accurate, both because a wider selection tends to a more accurate ratio or average, and because the uncertain portion, to which the ratio or average is applied, is correspondingly lessened.

The following independent test may be of interest. In 1923 our Bureau of Statistics brought down to the close of 1922 the various tentative valuations from the date as of which made in each case, including materials and supplies and cash on hand reported by the carrier as working capital. In the western district, which includes the western group and mountain-Pacific group, there were 22 Class I roads so treated. Their average value per mile operated, less trackage rights, was found to be $54,573 on December 31, 1922. This includes equipment. Applied to the mileage for the western district the value became $6,951,115,373. Adding 7 per cent to cover roads of Class II and Class III, and switching and terminal companies, it produces $7,437,000,000. The average net railway operating income of the 22 roads in 1922 was $1,925 per mile, while the average for all the Class I roads in the western district was $2,494. Obviously, the machine which produces the latter average is likely to have a greater physical content and be more valuable than the plant which produces the former and lesser figure. This indicates that remaining valuations should increase rather than decrease the figure thus derived.

We have reviewed the evidence submitted on the question of value, and nothing of record leads us to conclude that the basis of approximate value in the western district adopted by us in 1920 and reviewed in 1922 should be changed. A 5.75 per cent return on the value

adopted in 1920 would amount to $465,750,000 on an annual basis, as compared with the approximate actual return in 1923 of $380,704,000, or at the rate of 4.7 per cent. If allowance be made for the excess maintenance urged by complainants the return for 1923 would become 5.36 per cent, still less than a fair return. Moreover, this return takes no account of additions and betterments since December 31, 1919.

ALLEGED EXCESS EXPENDITURES FOR MAINTENANCE OF EQUIPMENT, 1923.

As hereinbefore stated, the complainants urge that material allowance should be made for excess expenditures for maintenance before the net railway operating income in 1923 is accepted as a basis for computing the rate of return earned in that year. In the western district in the first eight months of 1923 maintenance expenses represented the following percentages of the total operating expenses: For maintenance of equipment, 28.34 per cent; maintenance of way and structures, 18.19 per cent; and for total maintenance, 46.53 per cent. In the corresponding eight months of the years 1915, 1916, and 1917, maintenance expenses averaged the following ratios to the total operating expenses: Maintenance of equipment 23.08 per cent; maintenance of way and structures, 19.58 per cent; and total maintenance, 42.66 per cent. During the years 1915 to 1917, which constituted the test period for the purpose of the Federal control act, total maintenance expenses averaged 42.74 per cent, maintenance of equipment expenses, 23.20 per cent, and maintenance of way and structures, 19.53 per cent, of the total operating expenses. During the seven-year period 1911–1917, the average expenditures for maintenance of equipment were 22.22 per cent of total operating expenses, and for maintenance of way and structures, 19.88 per cent. The maximum proportion of total operating expenses absorbed by maintenance of way and structures during this period was 20.45 per cent in 1914, the maximum for maintenance of equipment was 23.37 per cent in 1916, and the maximum total for maintenance expenses 43.74 per cent, also in 1916.

Believing that the above figures indicate excess maintenance in 1923, the complainants attempted to determine normal operating expenses and a constructive rate of return for 1923 by certain computations based upon the test period. In the first eight months of the test-period years the ratio of all operating expenses, except maintenance of equipment, to all expenses averaged 76.92 per cent. Deducting the actual expenditures for maintenance of equipment in the first eight months of 1923, $335,429,943, from the actual total operating expenses, $1,183,770,091, the expenses not including maintenance of equipment were found to be $848,340,148. So-called normal total operating expenses were then determined by treating this sum as

76.92 per cent of the total, a constructive normal operating expense of $1,102,886,300 being thus obtained. By this method the abnormal expenditure for maintenance of equipment was computed to be $60,883,791. Assuming that this abnormal expenditure should be spread over a period of three years, complainants insist that two-thirds should be eliminated from the expenditures for 1923 and added to net income before computing the rate of return.

That there was a greater expenditure for maintenance of equipment during 1923 than in other years is shown by the record. The increase in 1923 over the years 1918 to 1922, inclusive, however, is not nearly so great as that over the test-period years. During the five-year period, 1918 to 1922, the lowest maintenance of equipment ratio was 25.37 per cent, and the highest 26.66 per cent, as compared with a ratio of 28.47 per cent in 1923, and an average of 23.08 per cent as computed by complainants for the first eight months of the test-period years. There have been large reductions in the number of bad-order locomotives and cars in the past year, and obviously this is one of the main causes of the increased expenditures in 1923. Some of the deferred maintenance doubtless resulted from the shopmen's strike of 1922. It is difficult to determine the extent of the excess expenditures in 1923, since for a normal standard of comparison we must resort to the test period of other pre-war years, and many factors involved in the maintenance cost have subsequently undergone material change. Among the principal things which have thus affected the cost of equipment repairs in recent years, the following may be mentioned: Growth of traffic, which has necessitated an increase in the number of equipment units of all classes and which must be maintained in lean years as well as good; increased size and capacity of locomotives and cars; heavier loading of cars; improved character of construction due to greater use of steel; extended use of superheaters, feed-water heaters, mechanical stokers, boosters, electric headlights, and other devices for increasing locomotive efficiency; increased cost of labor and materials; and changes in working rules and conditions of employment: The improvement in the character of equipment construction and the constant addition of costly devices and appurtenances to locomotives have doubtless increased the proportion of high-priced skilled labor necessary in making repairs.

The combined effect of these and other causes has been to bring about a readjustment in the ratios of maintenance of way and structures, maintenance of equipment, and transportation expenses to the total operating expenses, as shown by the following table, which also shows ratios of maintenance of way and structures and maintenance of equipment to transportation expenses for Class I

roads (excluding switching and terminal companies), 1911–23, western district.

	Maintenance of way and structures expenses		Maintenance of equipment expenses		Total maintenance expenses		Transportation expenses
	Per cent of total operating expenses	Per cent of transportation expenses	Per cent of total operating expenses	Per cent of transportation expenses	Per cent of total operating expenses	Per cent of transportation expenses	Per cent of total operating expenses
Year ended—							
June 30, 1911	20.20	38.96	20.69	39.92	40.89	78.88	51.84
June 30, 1912	19.76	37.89	20.72	39.75	40.48	77.64	52.14
June 30, 1913	20.32	39.95	21.80	42.87	42.12	82.82	50.85
June 30, 1914	20.45	40.87	22.27	44.51	42.72	85.39	50.03
June 30, 1915	19.29	38.64	23.00	46.10	42.28	84.73	49.90
June 30, 1916	20.37	41.87	23.37	48.03	43.74	89.90	48.65
Test-period average, fiscal years 1915, 1916–17	19.53	39.28	23.20	46.65	42.74	85.92	49.74
Year ended—							
Dec. 31, 1916	19.95	40.66	23.70	48.31	43.64	88.97	49.05
Dec. 31, 1917	17.55	33.39	22.94	43.67	40.49	77.07	52.54
Dec. 31, 1918	18.01	36.01	26.66	53.31	44.67	89.33	50.01
Dec. 31, 1919	19.47	39.83	26.20	53.59	45.67	93.43	48.89
Dec. 31, 1920	20.59	42.47	25.37	52.33	45.97	94.81	48.49
Dec. 31, 1921	18.16	37.02	26.04	53.08	44.20	90.11	49.05
Dec. 31, 1922	18.32	37.66	26.26	53.96	44.58	91.62	48.66
Dec. 31, 1923 [1]	18.34	38.82	28.47	59.10	46.81	97.92	47.23

[1] Based on monthly reports; includes switching and terminal companies.

The increases in the cost of labor and materials in 1923 over the test period have not been in the same proportion in the three major groups of expenses, maintenance of way and structures, maintenance of equipment, and transportation expenses, which constitute from 92.18 per cent to 94.67 per cent of total operating expenses. In the interval between the test period and 1923, labor and materials, in the aggregate, increased in cost approximately 100 per cent in the maintenance of way and structures group, 90 per cent in the maintenance of equipment group, and 84 per cent in the transportation group.

The above table shows not only the ratios of the maintenance expenses to total operating expenses, but to the transportation expenses as well. It indicates the unreliability of the test-period ratio as a sole basis for estimating normal maintenance of equipment expenses. The table shows that these ratios had undergone considerable change prior to the war, and that the trend was in the same direction subsequently. Any reliable method for determining normal maintenance must give consideration, as nearly as may be, to the various conditions affecting cost. Differences in the amount of use occasioned by traffic, in the amount of property to be maintained, in the tractive power of locomotives, in the capacity and loading of cars, in the cost of labor and materials, as well as in other things, can not be ignored. We have not reached the point where we can confidently estimate the

normal maintenance expenses for a given traffic in any period, because at present we lack the means for equating all of the relevant factors involved, but we are able to take into account most of the principal things which bring about a different cost in different years, such as variation in the use of the property due to traffic, relative tractive power of locomotives, and relative cost of labor and materials.

Clearly the expenditures for maintenance in the western district in 1923 were actually and relatively greater than in former years, but for the reasons hereinbefore given the test-period ratio is not a reliable guide. In *Rates on Grain, Grain Products, and Hay*, *supra*, page 97, the claim was made that carriers were undermaintained in 1920 and 1921. We found, in that case, that "maintenance in recent months apparently has not been markedly subnormal." The maintenance ratios of those years contrasted with 1923 have been shown. They were considerably higher than during the test period. Undoubtedly from the standpoint of efficiency of operation and service to the public there were good reasons for relatively greater maintenance expenditures in 1923 than in former years. If locomotives and cars were in need of repair, it was to the interest of shippers generally as well as of those in the western group that repairs be made. But the question here is not whether the expenditures were wise or otherwise, but whether the carriers in the western district, if due allowance is made for excess expenditures, earned the fair return contemplated by section 15a, and whether such excess expenditures constitute a basis for reducing rates on the commodities here under consideration. The present record indicates that maintenance expenditures in 1923 may have been somewhat abnormal. It can not be definitely determined on this record to what extent they may have departed from the "reasonable" expenditures contemplated by the act. It is not necessary to do so. We can assume that there was some excess expenditure for maintenance of equipment, or even assume the correctness of complainants' contention in this regard in its entirety. Making such assumptions, the carriers in the western district more nearly earned the fair return than is indicated by the net railway operating income as reported. But we do not find warrant for the conclusion that without such excess maintenance expenditures the carriers in that district would have earned more than, or as much as, the fair return of 5.75 per cent. Moreover, the determinative question is: What rates, as applied to traffic to be offered, will be likely to produce a fair return hereafter? As stated in *Rates on Grain, Grain Products, and Hay*, *supra*, page 99, past or present statistics of operation and earnings are serviceable only as they illuminate the future.

Those advocating reductions also present for consideration (*a*) comparisons of earnings, particularly car-mile earnings, of grain and grain products as compared with all other traffic, (*b*) the more efficient utilization of equipment by the shippers of grain and grain products, (*c*) rate comparisons, (*d*) the economic condition of agriculture, and (*e*) the "element of value" of commodities in making rates; and the shifts in price levels of various commodities.

COMPARISON OF EARNINGS OF GRAIN, GRAIN PRODUCTS, AND HAY COMPARED WITH OTHER TRAFFIC.

Upon request of complainant in No. 14393, the respondents supplied statistics of revenue traffic, covering 69 different carload commodity groups for the year 1923, of 10 leading western-group railroads, which comprise 47,191.79 miles. On these 10 lines grain, grain products, and hay contributed 15.2 per cent of the total loaded car-miles, 17.2 per cent of all ton-miles, and furnished 15.5 per cent of all carload revenue. The statistics may be further summarized. Average hauls hereinafter stated are average hauls per ton:

	Tonnage carried	Number of cars	Average loading	Average haul	Average revenue			
					Per car	Per car-mile	Per ton	Per ton-mile
	Tons		*Tons*	*Miles*		*Cents*		*Mills*
All carload traffic	213,157,078	7,273,677	29.31	213	$68.17	28.46	$2.33	10.9
Grain and grain products	29,317,024	900,080	32.57	267	79.48	29.76	2.44	9.1
Hay	1,493,380	120,317	12.41	195	39.11	20.06	3.15	16.1
All carload traffic, excluding grain, grain products, and hay	182,346,674	6,253,280	29.16	204	67.09	28.38	2.31	11.31

Six of these commodity groups are of various grains and grain products, and 22 others are of products of agriculture or animals and products thereof. In all these 28 commodity groups the agricultural industry is interested. Of 41 remaining commodities, 16 yield lower revenue per car-mile than the average revenue per car-mile on grain and its products. The combined tonnage of these 16 commodities is approximately the same as the aggregate tonnage of grain and grain products. Lumber, timber, box shooks, staves, and heading, which we will refer to collectively as lumber, together form one of the commodity groups that yields lower car-mile revenue. The commodities included in this designation constitute about 60 per cent of the tonnage of the 16 commodities referred to. The average haul on lumber was 381 miles, as compared with an average haul of 267 miles on grain and grain products. The revenue per car-mile on lumber is 21.59 cents, but the total revenue per car is higher than on

grain and its products. On only four of the 16 commodity groups is the average haul less than on grain and grain products, and in most instances it is substantially greater. It should be remembered, however, that a considerable portion of the grain and grain-product tonnage is stopped in transit at mills or elevators, which under accounting practices would have the effect of indicating shorter distance hauls than the miles actually traversed from origin to destination, or than those upon which the rates are based. For 17 of the commodity groups the average revenue per ton is less than the average revenue per ton on grain and grain products. Such heavy-loading commodities as anthracite coal, lumber, iron ore, clay, gravel, sand, and stone constitute at least 75 per cent of this tonnage. For 10 commodity groups out of the 69 the average ton-mile revenue is less than the average on grain and grain products.

The average earnings of the leading classes of commodities embraced in "all carload traffic" for 1923 for the 10 roads included in the foregoing statement, compared with average earnings on grain and grain products, are as follows:

Class	Average haul	Per car	Per car-mile	Per ton-mile
	Miles		*Cents*	*Mills*
Grain and grain products	267	$79.48	29.76	9.1
Products of agriculture	287.2	78.38	25.77	10.44
Animals and products	258.7	59.40	23.79	19.97
Products of mines	127.2	50.83	37.70	8.9
Products of forests	237.3	58.56	23.52	8.4
Manufactures and miscellaneous	262.6	86.05	31.46	13.09
All carload traffic	213	68.17	28.46	10.94
All carload traffic, excluding grain, grain products, and hay	204	67.09	28.38	11.31

It will be noted that, for a somewhat longer average haul, the earnings per car-mile on grain and grain products are slightly greater than those on the average of all carload traffic, or on all carload traffic excluding grain and grain products. They are materially greater than the earnings on products of forests, on animals and products, or on the average of all products of agriculture. The car-mile earning of "all carload traffic," omitting products of agriculture and livestock, in the rates on which the grain-raising farmer has also generally a direct interest, is 30.3 cents as compared with 25.77 cents on all products of agriculture, and 29.76 cents on grain and grain products. The average hauls of the individual commodities making up the "all carload traffic" figure have been referred to. The earnings per ton-mile on grain and grain products are greater than on products of mines and products of forests, but are substantially less than on all carload traffic and on all carload traffic excluding grain, grain products, and hay. In 1923 all carload traffic, excluding products of agriculture, furnished 75.3 per cent

of the total ton-miles, 76 per cent of the total car-miles, and 76.4 per cent of the total carload revenue of these 10 roads.

About 40 per cent of the annual corn crop is fed to hogs, which constitute about one-third of the carload traffic of "animals and products" above. For the 10 carriers submitting these statistics, hogs produced average revenue per car of $43.08, and per car-mile of 22.63 cents, with an average haul of 192.4 miles.

The car-mile earnings of wheat and corn alone on these 10 roads are respectively 42.63 and 37.18 cents. As the rates on all grains and their products are assailed, and we can not reduce the rates on wheat, for example, without disturbing established relationships on all other grains and grain products, the average earnings on all grains and grain products together are more fairly compared when placed in contrast with other classes of traffic and with all carload traffic.

Grain products usually move on the remainder of through rates. Transit arrangements are of value to the farmer as well as to the miller and the market, in that the farmer is thus afforded wider marketing opportunities.

The following revenue statistics of 22 western-district railroads, aggregating 56,925 miles of line in 1922, and including the 10 western-group roads heretofore referred to, are of record:

	Tonnage carried, 1922	Number of cars, 1922	Average loading	Average haul	Average revenue, 1922		Average revenue, six months, 1923	
					Per car-mile	Per ton-mile	Per car-mile	Per ton-mile
	Tons		*Tons*	*Miles*	*Cents*	*Mills*	*Cents*	*Mills*
All carload traffic	211,408,445	7,354,846	28.74	209	31.06	11.86	29.30	11.08
Grain and grain products	33,945,110	1,040,447	32.63	266	30.76	9.32	28.95	8.97
Hay	1,653,706	132,375	12.49	181	20.97	16.75	20.03	16.20
Products of agriculture	45,636,346	1,755,831	25.99	274	28.39	11.04	25.48	10.26
All carload traffic, excluding products of agriculture	165,772,099	5,599,015	29.61	191	32.13	12.18	30.49	11.32
Animals and products	8,977,798	779,599	11.52	252	24.18	20.59	24.00	20.53
Products of mines	73,354,534	1,658,205	44.24	128	40.29	9.43	38.12	8.84
Products of forests	33,636,055	1,187,190	28.33	239	24.80	9.11	24.45	8.60
Manufactures and miscellaneous	49,803,442	1,974,021	25.23	242	35.97	14.79	33.57	13.82

The reductions on grain and grain products required in *Rates on Grain, Grain Products, and Hay*, *supra*, as well as those on agricultural commodities generally, are reflected throughout all of 1922, while the general reductions required in 1922 did not become effective until July 1, of that year. This tends to impair the significance of a comparison of earnings on grain with earnings on other carload traffic in the full year 1922. The criticism does not apply to the figures given for the first six months of 1923. During that period

all carload traffic, except products of agriculture, furnished 77.7 per cent of the total ton-miles, and 79.4 per cent of the total carload revenue.

On the 22 western roads previously referred to, grain and its products in the first six months of 1923 furnished 12.7 per cent of the tonnage, 15.9 per cent of the ton-miles, while they yielded 12.8 per cent of the total carload revenue.

Respondents take the position that the earnings heretofore shown indicate that the existing level of rates on grain and grain products is reasonable. The record shows the following as to seven representative railroads in the western group, aggregating 35,295 miles:

	First six months, 1917	Calendar year, 1917	Calendar year, 1922	First six months, 1923
Average revenue per ton-mile:				
Grain and grain products.....mills..	5.70	6.08	9.48	9.10
Hay.....mills..	11.28	10.86	17.11	16.70
All carload traffic, excluding products of agriculture...mills..	7.17	7.21	12.05	11.11
Average revenue per car-mile:				
Grain and grain products.....cents..	17.61	19.13	31.83	30.23
Hay.....cents..	13.87	13.42	21.80	20.79
All carload traffic, excluding products of agriculture..cents..	20.73	21.43	36.20	33.54
Ratio of grain, grain products, and hay ton-miles to all ton-miles:				
Grain and grain products.....per cent..	19.50	17.58	22.72	17.52
Hay.....per cent..	.78	.81	.63	.65
All carload traffic, excluding grain, grain products, and hay.....per cent..	79.72	81.61	76.65	81.83
Ratio of grain, grain products, and hay revenue to all carload revenue:				
Grain and grain products.....per cent..	16.0	15.01	18.54	14.67
Hay.....per cent..	1.26	1.23	.93	1.01
All carload traffic, excluding grain, grain products, and hay.....per cent..	82.74	83.76	80.53	84.32
Average haul:				
Grain and grain products.....miles..	306	284	268	265
Hay.....miles..	183	199	179	180
All carload traffic, excluding grain, grain products, and hay.....miles..	210	206	193	199

The car-mile earnings in the first six months of 1923 on grain and grain products are 71.7 per cent higher than in the first six months of 1917, while on all carload traffic, excluding products of agriculture, the car-mile earnings in the first six months of 1923 are but 61.8 per cent greater than in the corresponding period of 1917. However, the spread between car-mile earnings on grain and grain products and all carload traffic, excluding products of agriculture, has actually remained about stationary. The earnings on grain and grain products increased during this period about 12.62 cents per car-mile, as compared with an increase of 12.81 cents per car-mile for all carload traffic, excluding products of agriculture. Grain and grain products furnished 1.33 per cent less revenue in the first six months of 1923 than in the similar period in 1917, while all carload traffic, excluding grain, grain products, and hay, furnished 1.58 per cent more revenue in the 1923 period than in the 1917 period.

Certain important grain-carrying roads produced evidence as to their individual situations. The showing may be summarized.

Chicago, Rock Island & Pacific Railway.—For the first six months ending June 30, 1923, grain, grain products, and hay furnished 18.7 per cent of all carload tonnage of this carrier, and 17.1 per cent of the carload revenue. In 1913 these commodities furnished 23.4 per cent of the tonnage, and 23.4 per cent of the revenue. In 1917 the average earning per ton on grain and grain products was $1.74, compared with $1.88 on all carload traffic. In the 1923 period stated, the average revenue per ton of grain and grain products was about 48.2 per cent more, or $2.58. The revenue per ton on all carload freight, first six months of 1923, was $2.83, an advance over 1917 of 50.5 per cent. In the same period grain and grain products furnished 18.2 per cent of the tonnage, 21.8 per cent of the ton-miles of all carload freight, and produced 16.7 per cent of the revenue from all carload traffic. The average haul on grain and grain products in the first six months of 1923 was 299 miles, and on all carload traffic 251 miles.

Chicago, Burlington & Quincy Railroad.—In the first nine months of 1923 grain, grain products, and hay furnished 15.30 per cent of the total carload tonnage on this line and produced 13.90 per cent of the total carload revenue. In 1915 grain and grain products furnished 15.66 per cent of the total carload tonnage and 17.90 per cent of the revenue. In every year since 1915, except 1919 and 1922, the per cent of revenue exceeded the per cent of tonnage. The average haul is not given.

Union Pacific Railroad.—In the first nine months of 1923 grain and grain products furnished 17.5 per cent of all tonnage and produced 7.4 per cent of all revenue from freight, including less-than-carload tonnage. In 1917 grain and grain products furnished 16.4 per cent of the tonnage and 10.1 per cent of the freight revenue. The average haul is not given.

Chicago & North Western Railway.—In the first eight months of 1923 the total tons of grain and grain products represented 11.36 per cent of all carload freight. The average revenue per ton-mile on grain and grain products during the same period was 9.5 mills, as compared with 11.8 mills on all carload freight, or 80.5 per cent of the average revenue per ton-mile on all carload traffic. In 1913 the ton-mile earnings on grain and grain products were 85.9 per cent of those on all traffic and in 1920, 92.9 per cent. The spread in earnings of grain and grain products as compared with all carload traffic except grain and grain products, expressed in mills per ton-mile, has widened from 1.1 in 1913 to 2.3 in 1923 in favor of grain and its products. In the pre-war period, 1912–1915, the average

revenue per ton on grain and grain products was $1.56; in the first eight months of 1923, $2.01, an increase of 28.8 per cent. On all carload freight the average was $1.08 in the pre-war period and $1.74 in 1923, an increase of 61.1 per cent. In the 1923 period the car-mile revenue on this line on grain and grain products was 33.32 cents, as compared with 34.3 cents on all carload traffic, except products of agriculture and animals and products. In 1913 similar earnings were on grain and grain products 20 cents, as compared with 19.1 cents on all carload traffic except products of agriculture and animals and products. The increase in car-mile revenue for 1923 over 1913 was 65.6 per cent. Of other commodities handled in large volume by this carrier, on all items included in manufactures and miscellaneous, the corresponding increase was 75 per cent, on soft coal 77.5 per cent, on cement 103 per cent, and on iron and steel 136 per cent. The average ton-haul on grain and grain products was 212 miles in 1923, and on all carload freight 152 miles.

Chicago Great Western Railroad.—In the 12 months ended June 30, 1923, grain and grain products furnished 21.8 per cent of the tonnage, compared with 25 per cent for an average of the five years ending June 30, 1916. In the 12 months ended June 30, 1923, grain and grain products produced 17.4 per cent of all revenue from carload freight, as compared with 24.8 per cent during the same five-year period. The average revenue per ton of grain and grain products increased from $1.547 in 1912–1916 to $2.183 for the year ended June 30, 1923, or 41.1 per cent. The increase in average revenue from all carload freight was from $1.56 to $2.73, or 74.9 per cent. In the year ended June 30, 1923, for an average haul of 303 miles and an average loading of 34 tons per car, grain and grain products produced car-mile revenue of 24.5 cents; while on other carload freight, except grain and grain products, for an average haul of 302 miles and an average loading 11 tons less, the revenue per car-mile was 22 cents.

Missouri Pacific Railroad.—For the first nine months of 1923 grain and grain products constituted 13.70 per cent of the tonnage, 16.81 per cent of the ton-miles, 15.13 per cent of the car-miles, and produced 13.37 per cent of the revenue. The revenue per ton-mile was 8.4 mills, and per car-mile 25.45 cents; as compared with 10.95 mills and 29.74 cents on all carload freight except grain, grain products, and hay. The average haul on grain and grain products was 279.3 miles, and 235.49 on all carload traffic except grain, grain products, and hay.

The Northern Pacific, Great Northern, Minneapolis, St. Paul & Sault Ste. Marie lines presented evidence as to the depression in the level of their grain rates brought about by competition with Cana-

dian carriers. The situation on the Great Northern may be briefly referred to as typical. Rates on wheat and coarse grains from stations on this road in Minnesota, North Dakota, and South Dakota to Minneapolis range from 61 to 90 per cent of rates under a scale prescribed by us in *South Dakota R. R. Commissioners* v. *Director General*, 73 I. C. C. 347, for application on these commodities moving from South Dakota to points in Iowa.

The rates on wheat, coarse grain, and flax from representative points in Minnesota and North Dakota to Duluth, Minn., are compared with the rates on hard and soft coal and cement applying on movements in the reverse direction. The rates on wheat and flax average but little higher than the rates on coal, and are generally lower than the rates on cement for corresponding distances. In view of our conclusion further analysis of these rates is unnecessary.

The earnings shown for the 22 roads and for the individual roads indicate relatively lower average earnings on grain and grain products than on "all carload traffic," while the earnings on the 10 roads are shown to be slightly higher on grain and grain products than on all carload traffic. The latter figures cover the entire year 1923, while the former are for fractional portions of the year, usually six months. The statistics for the 22 roads include the results upon the 10 roads for the first six months of 1923. While the heavier movement of grain the last half of the year may have some bearing upon this discrepancy, the record does not show that so much more grain moves on lower reshipping rates in the first half of the year than in the second half as to have any marked effect on the relative earnings. The amount of wheat received at and shipped from eight important primary markets in the year 1921 is shown. During the first six months of that year, the receipts at the eight primary markets exceeded the shipments therefrom by 36.4 per cent. During the last six months the receipts were 39.2 per cent greater than the shipments. The record also shows that for seven representative western-group roads the tonnage of grain and grain products in the first six months of 1923 bore about the same relationship to the annual tonnage of those commodities as did the movement of wheat from the farm to market in the first half of the year bear to the total annual movement from the farm.

Complainants claim that ton-mile earnings do not reflect changes in the relationship of rates on grain as compared with rates on other commodities. They assert that the diversion in recent years of low-earning, transcontinental traffic to the Panama Canal has increased the average ton-mile earnings on the remaining traffic, and that increases in tonnage of heavy-loading commodities, such as iron ore, have had a similar tendency.

ECONOMIC UTILIZATION OF EQUIPMENT

Complainants lay stress on the better and more economic utilization of equipment by grain, as compared with other commodities, indicated by the increase in average loading since 1913 and the use of cars to their capacity. This showing may be summarized:

	Average capacity, box cars	Average capacity, all cars	Average loading	Ratio of loading to capacity
Grain:	*Tons*	*Tons*	*Tons*	
Year 1913	38		[1] 33.2	87.4
Year 1921	42.5		[2] 38.7	91.05
All traffic:				
Year 1913		34	[3] 18.5	54.4
Year 1921		37.4	[3] 21.4	57.2

[1] Average loading of grain on Rock Island.
[2] Six selected western roads.
[3] Annual reports of Class I carriers in western district.

Corresponding figures as to grain products are not presented. The loading of the latter is generally lighter than that of grain. It often happens that three cars are required to handle the milled products from grain that moves into a transit point in two cars. The average loading for grain and grain products for the first six months of 1923 on all Class I railroads in the western district was 33.54 tons, as compared with an average for all carload traffic of 31.11 tons. The average loading for the three classes of traffic, products of mines, products of forests, and manufactures and miscellaneous, which on 10 important roads contributed over 75 per cent of the carload tonnage in 1923, was 35.91 tons. The average loading of all agricultural products, excluding grain and grain products, was 15.70 tons. In the table above the all-traffic figure includes less-than-carload traffic. The disparity in loading between grain and grain products and all traffic is much greater than if we made the fairer comparison, that of grain and grain products with other classes of carload traffic, or with the average of all carload traffic. Moreover, we gave effect to this factor when we required reductions on the commodities here in issue in *Rates on Grain, Grain Products, and Hay*, *supra*, pages 92–93.

RATE COMPARISONS

Complainants contrast the rates on wheat from representative points in Kansas, Nebraska, Oklahoma, and Colorado to the nearest Missouri River market with rates for similar distances in central territory. Generally, the latter are on a somewhat lower basis. They also contrast the export rates on wheat from four points in each of the

States of Oklahoma, Kansas, and Nebraska to Galveston, Tex., with rates for equidistant hauls from points in central and trunk-line territories to New Orleans, La., and to Atlantic ports. For distances ranging from 544 miles to 1,151 miles the rates from the western points to Galveston range from 41 cents to 53 cents, as compared with a range of from 20.5 to 34 cents from the central-territory points to New Orleans or Atlantic ports. The comparative traffic densities of the two territories must be considered, and may thus be illustrated:

	Tons one mile per mile of road	Freight revenue per mile of road
Great Lakes region	2,525,092	$29,178
Ohio, Indiana, and Allegheny regions	3,090,058	34,308
Pocahontas region	4,343,518	31,170
Northwestern region	886,482	10,500
Central western region	1,016,518	13,437
Southwestern region	740,094	10,508

The foregoing indicates a reason for a higher unit cost of transportation in the western region and for a generally higher level of rates on all commodities. Moreover, there is no differential between wheat and coarse grains in central territory. Generally a 10 per cent spread exists in the western group between wheat and coarse grains as required by us in *Rates on Grain, Grain Products, and Hay, supra*, and in our report on further hearing in that case, 80 I. C. C. 362.

THE ECONOMIC CONDITION OF AGRICULTURE

The record contains much as to the past and present economic condition of agriculture. This was also stressed by complainants and referred to at considerable length in the hearings on which we based our reports in *Rates on Grain, Grain Products, and Hay, supra*, and in No. 14393. The testimony in this proceeding covers a variety of subjects, and we can not detail it all. Much said in the reports cited as to the issues there involved we could state equally well upon this record. Complainants in the *Kansas case* claim that agriculture in the western group for three years has been carried on at a loss, and that it is now in a worse economic condition than ever before. Respondents contend that there has been progressive improvement in the economic and financial condition of the agricultural industry in that group since our reports cited. In those reports we summarized the showing of record as to the then predicament of the western grain-and-hay farmer. While we are not governed in our decisions by the doctrine of *stare decisis*, we have twice examined, fully considered, and passed upon the general level of the

grain-rate structure in the past few years. *Rates on Grain, Grain Products, and Hay, supra; Reduced Rates, 1922, supra.* Unless those decisions were founded upon error or upon conditions which have since undergone material change, we may confine ourselves to the new circumstances which have arisen and to the new evidence that has been presented. *Receivers & Shippers Asso.* v. *C., N. O. & T. P. Ry. Co.*, 18 I. C. C., 440, 445, and *Flour City S. S. Co.* v. *L. V. R. R. Co.*, 24 I. C. C., 179, 189. Nevertheless, we will again examine the more important matters bearing upon the farmers' economic condition as shown by the entire record with a view to developing such changes as since have occurred and to determining whether our former reports were based upon error or upon conditions which have materially changed.

A consideration emphasized by those advocating rate reductions is the price relationship of farm products to the commodities which the farmer must buy, including transportation, and with other non-agricultural commodities. Otherwise stated, this is the variable but diminishing purchasing power of the farmer's dollar. In our report in the *Kansas case* we said:

> Examination of the Department of Labor's index numbers of wholesale prices by groups, using 1913 as a basic, or 100 per cent year, shows that for the calendar year 1922 the index number for farm products was 133 as compared with an average of 149 on all commodities. For the first four months of 1923 the index numbers were 142 and 158, respectively. The index for farm prices of crops for 1922 was but 113. It is this price-relationship situation that constitutes the foundation of complainant's contention that, taking into consideration the prices received by the farmer for his product, compared with prevailing prices on other commodities, agriculture is contributing more than its proportionate share to the maintenance of the transportation machine in the western group.

The wholesale price index numbers for the remaining period of 1923 are shown below:

Month	Farm products	All commodities	Month	Farm products	All commodities
May	139	156	September	144	154
June	138	153	October	144	153
July	135	151	November	146	152
August	139	150	December	145	151

The wholesale price index numbers for the last three years based on the monthly averages in each year are as follows:

	Farm products	All commodities
1921	124	147
1922	133	149
1923	141.6	154

During 1922 and 1923 there has been an appreciable lessening of the spread between the wholesale-price levels of farm products and of all commodities. The trend seems to be toward a narrowing of the disparity between wholesale prices of farm products and non-agricultural products. But, as the farmer is not a large buyer of commodities at wholesale prices, this trend and relationship are not as persuasive of the practical purchasing power of his dollar as would be the case if he were a large wholesale purchaser of all the commodities included in the showing.

Still dealing with index numbers and taking 1913 as a basic or 100 per cent year, the average farm price of the 10 leading crops and five kinds of livestock for the past three years was, for 1921, 108; for 1922, 113; for 1923, 120. A comparison of the weighted-average price of 31 farm products for the past three years shows the following: 1921, 118; 1922, 125; 1923, 139.5. In June, 1921, at the depth of the depression, the index number was 106. The weighted average of these 31 farm products for the five-year period August, 1909, to July, 1914, is taken as a base, or 100.

To arrive at the theoretical purchasing power of the farmer's dollar, complainants in the *Kansas case* take the average of the index numbers of 10 leading crops and five kinds of livestock, which for 1923 was 120, and divide into this figure the average index number for all commodities for that year, after excluding farm products and food, which was 167. So computed, 72 cents is said to represent the purchasing power of the average farmer's dollar during 1923. Similarly computed, the purchasing power of this dollar for 1921 and 1922 was 67 and 69 cents, respectively.

The method used was criticized by respondents in that it does not take into account all commodities produced on the average farm, since items such as poultry, butter, and eggs are omitted. Nor, in respondent's view, does it seem proper to exclude farm products and foods from the "all commodity" group in arriving at the appropriate divisor, while including many items which to the average farmer mean little, such as rents, fuel, and light. They point out that farmers raise perhaps half of the food consumed on the farm, that they thus have more money available for other purposes, and that farmers do buy flour, sugar, coffee, meat, and other food products, corn, cattle, and livestock. They claim that a more correct method of approximating the purchasing value of the average farmer's dollar for any period would be to divide the index number for the weighted average of 31 farm products by the index number for all commodities. So computed, the purchasing value for 1923 would have averaged 88 cents, and for 1922, 82 cents, as compared with the low point of 70 cents in June and July, 1921. Respondents

contend that the number of dollars coming to the average farmer in the respective periods is also an element to be considered. While respondents show the total gross value of farm products, including animals and products, in the United States in 1923 was 63 per cent more than in 1913, it is not shown that grain farmers are now receiving a correspondingly increased number of dollars. The value of the 1923 wheat crop, based on December 1 prices, is $738,990,000 as compared with a value of $610,000,000 in 1913. The increase in acreage, 1923 over 1913, was about 16 per cent. As computed by complainants, the purchasing power value of the 1923 wheat crop was $569,022,300.

As further indicating the relatively low purchasing power of grains in 1923, the complainants presented the following figures purporting to show the relative purchasing power of wheat, corn, and hay (farm prices) in terms of all commodities and of nonagricultural commodities. The purchasing power in 1913 is taken as 100.

Months	All commodities			Cloths, etc.			Fuel, etc.		
	Corn	Wheat	Hay	Corn	Wheat	Hay	Corn	Wheat	Hay
January	76	85	73	61	68	56	55	61	50
February	80	85	69	63	67	55	59	63	51
March	81	86	71	64	68	56	62	66	55
April	91	88	72	71	68	56	73	70	57
May	92	87	76	71	68	59	75	72	62
June	95	79	69	74	61	54	78	65	57
July	97	71	72	76	55	56	80	58	59
August	97	75	73	76	59	57	82	63	62
September	93	77	73	71	59	56	82	68	64
October	92	79	74	71	61	57	82	70	66
November	80	78	84	61	59	64	73	71	77

Months	Metals, etc.			Building materials			House furnishings		
	Corn	Wheat	Hay	Corn	Wheat	Hay	Corn	Wheat	Hay
January	89	100	83	63	71	58	63	72	60
February	90	96	78	65	70	57	68	73	59
March	86	91	76	65	69	57	69	74	61
April	94	91	75	71	69	56	77	75	61
May	94	90	78	71	67	58	76	73	63
June	99	82	72	75	62	58	78	65	57
July	101	74	74	77	56	57	79	57	58
August	101	78	76	79	61	59	80	62	60
September	100	83	79	79	65	62	79	66	62
October	100	85	80	78	67	62	77	66	62
November	87	84	91	67	65	71	69	67	73

The farmer's dollar has depreciated, not alone with the general decline in purchasing power of money, but to a greater extent than in the case of most other industries. This is particularly so of the dollar of the grain farmer in the West. Respondents lay stress upon the improvement in the agricultural situation since the depth of the depression in 1921. In Kansas the purchasing value of farm prod-

ucts in 1923 exceeded that in 1922 by $47,300,000, or almost 20 per cent. This entire increase, however, was apparently in products other than grain. No figures are given us as to the total purchasing value of the 1923 crops of the other States. The State boards of agriculture of Oklahoma and Missouri estimate the increased crop values for 1923 over 1922 in those States at $25,000,000 and $80,000,000, respectively, while the United States Department of Agriculture estimated increases in crop values in South Dakota, Minnesota, Nebraska, and Iowa of $10,400,000, $17,000,000, $28,700,000, and $27,400,000, respectively. An increase of 16 per cent in production of grains in Missouri in 1923 as compared with 1922 is indicated by the record, while in South Dakota less than one-fifth, and in Minnesota less than one-half, of the increase in crop value appears to be represented by grain.

In 10 States—Kansas, Iowa, Minnesota, Misouri, Nebraska, North Dakota, Oklahoma, South Dakota, Texas, and Wisconsin—the total farm value of all crops has progressively increased since 1921. The total farm value in 1921 was $1,870,375,000; in 1922, $2,795,492,000; and in 1923, $3,155,918,000. These values are derived by the use of December 1 prices customarily used by the Department of Agriculture in estimating annual farm values. However, more than $500,000,000 of the increase of 1923 over 1921 was due to the greater production and higher price of cotton, which in the above States of the western group is grown only in Texas, Oklahoma, and Missouri. During the same period the total acreage of crops in these 10 States increased from 173,570,000 in 1921 to 175,542,000 in 1923.

So far the discussion relative to the economic condition of agriculture has dealt almost wholly with the average farmer of the West and of the United States. But we are in this case dealing directly only with rates on grain, grain products, and hay, and in this portion of our report we are considering particularly the situation in the western group. Confining the comparison to wheat, corn, and other grains, including grain sorghums, and flaxseed, the figures for the same 10 States show substantial increases in total farm values, 1923 over 1921, as follows:

Year	Production	Farm value
	Bushels	
1921	2,876,283,000	$1,186,845,000
1922	2,995,825,000	1,811,922,000
1923	2,902,479,000	1,812,512,000

About $500,000,000 of the increase, 1923 over 1921, of nominal farm values is due to the higher price of corn in 1923. It is estimated that 80 per cent of the corn is fed to livestock on the farm where

grown and finds its way to market as livestock. The prices for livestock were not satisfactory during 1923. From the point of view of practical benefit to the farmer, therefore, so much of the increase as is caused by the high price of corn is more nominal than substantial. Based on the farm value of the 1923 corn crop in eight of the 10 western States named, and on the farm value of hogs based on November 15, 1923, prices, complainants estimate that the nominal value of that portion of the 1923 corn crop fed to hogs will exceed the financial return from the sale of the hogs by $105,893,000. The shrinkage in the value of the corn crop by feeding it to animals will probably average 15 per cent.

The grain production alone in thousands of bushels in the 10 named States for the past three years was as follows:

Year	Corn	Oats	Barley	Rye	Wheat	Total
1921	1,548,799	656,081	92,751	34,055	434,081	2,765,767
1922	1,458,571	781,843	115,865	71,934	476,223	2,904,436
1923	1,566,713	803,194	122,368	34,744	328,482	2,855,401

While there was a marked reduction in the production of wheat in 1923, compared with 1922, there were increases in the other grains, except rye. This is an effect of the diversification programs being carried on in most of these States. Considerably less acreage was planted to wheat, and more to corn, oats, and other crops. Drought, insects, or rust also caused decreased production of wheat in some localities, and the farmers in the West where crops were thus affected are in a more serious financial condition than others.

Increases in values of grains and hay 1922 over 1921 in the States of Kansas, Nebraska, Wisconsin, Minnesota, Oklahoma, Missouri, Iowa, Colorado, North Dakota, and South Dakota are indicated of record as follows:

Corn	$342,000,000
Wheat	78,000,000
Oats	108,000,000
Barley	22,000,000
Rye	22,000,000
Flax	23,000,000
Grain sorghums	17,000,000
Hay	81,000,000
Total	691,000,000

There was about a similar increase in the value of the products here in issue, 1923 over 1921, although the distribution was somewhat different.

The rise and fall of farm grain prices in the United States from 1913 to 1923 is illustrated by the following weighted-average farm

price of corn, wheat, and oats, compiled by the Department of Agriculture:

Year	Corn		Wheat		Oats	
	Price per bushel	Index [1]	Price per bushel	Index [1]	Price per bushel	Index [1]
	Cents		*Cents*		*Cents*	
1913	59.4	100	78.4	100	36.8	100
1914	71.4	120	88.4	113	40.9	111
1915	71.2	120	105.2	134	42.5	115
1916	78.8	124	125.9	161	44.0	120
1917	129.2	218	200.8	256	62.7	170
1918	147.3	248	204.3	261	74.6	203
1919	151.5	255	212.7	271	69.4	189
1920	140.4	236	217.2	277	74.0	201
1921	58.6	99	112.7	144	34.7	94
1922	56.1	94	98.8	126	36.3	99
1923 [2]	81.1	137	98.2	126	41.5	113

[1] 1913 treated as 100.
[2] Average for first 11 months.

The disastrous effect upon farmers generally of the price recession since 1920 is well known. Much of the present record relates to such facts.

Bank clearings for the first 10 months of the years 1920–23, inclusive, in the six cities of Kansas City, Mo., Omaha and Lincoln, Nebr., Wichita and Topeka, Kans., and Oklahoma City, Okla., located in agricultural sections, were contrasted by complainants with clearings in the six eastern industrial cities of Pittsburgh and Reading, Pa., Buffalo, Syracuse, and Rochester, N. Y., and Hartford, Conn. The following is a summary of this showing:

	1920	1921	1922	1923
Six agricultural cities	$14,582,832,000	$9,828,254,000	$8,891,378,000	$9,220,503,000
Six industrial cities	10,541,557,000	8,785,807,000	8,637,390,000	10,102,898,000

The aggregate debits by banks to individual accounts in 14 reserve cities in the tenth (Kansas City) Federal reserve district for the past four years are as follows:

1920	$16,033,049,000
1921	12,267,815,000
1922	12,547,926,000
1923	13,918,808,600

The figures for the last two months in 1923 are estimated on the basis of the monthly average for 10 months.

Debits by banks to individual depositors' accounts, in the opinion of bankers, reflect general business activity; the larger the debits the greater the activity. They are regarded as a truer index of conditions than bank clearings. The foregoing comparison indicates, on

this basis, a slight but progressive trend toward increasing activity in the agricultural territory. A similar comparison, for the same period, of 12 cities in the first (Boston) reserve district shows the 1923 activity to have been greater than in 1920. This supports the contention that progress to recovery from the depression has been more rapid in industrial than in agricultural sections.

Insolvencies amongst farmers and the increasing number of bank failures in many of the States were referred to by complainants as indicative of the seriousness of the general agricultural situation. Of 34,401 reported bankruptcies in the United States in 1923, 5,945 were of farmers. The figures are not given separately for the western group, and the liabilities are not shown. The ratio to the total number of farmers is less than 1 per cent. However, persons engaged chiefly in farming or the tillage of the soil, in fact insolvent, may not be adjudged to be involuntary bankrupts under the Federal law. In the tenth (Kansas City) Federal reserve district, comprising member banks in seven States, there were 287 bank failures from January 1, 1920, to November 1, 1923. In Kansas there were 26 failures of State banks in 1923, as compared with 17 in 1922, 11 in 1921, and 2 in 1913. There are about 1,050 State banks in Kansas. The minimum capital stock permissible is $10,000. The average capital stock of the banks which failed in 1923 was about $25,000. In Minnesota there were 23 State-bank failures in 1923 as compared with 16 in 1922, 17 in 1921, none in 1920, and 15 in 1919. In Iowa there were 8 bank failures in the three-year period 1918-1920, as contrasted with 41 in the following three years up to November 1, 1923. No figures were presented as to assets and liabilities in any instance; and the State-bank failures for Kansas in 1921, 1922, and 1923 above specified are included in the aggregate number mentioned for the tenth (Kansas City) reserve district. Speaking generally, in great measure the bank failures seemingly have been caused by conditions that originated in 1918 and 1919, when credit was extended freely. When the loans reached maturity, or when extensions were no longer possible, the value of the farm products on the faith of which the loans had been made was deflated below the face of the loans, and the agricultural borrower had no other means with which to respond to his debts. The more rapid recovery of other industries prevented the same widespread effect throughout the country. Other causes of bank failures have been mismanagement and defalcations by officials and employees of banks, lack of judgment in making loans, and too many banks to take care of the needs of a given territory. Whether such conditions have existed to a greater extent in the agricultural West than

elsewhere in the country is not indicated. Some banks that have failed have subsequently reopened, and there has been salvage in many cases.

Complainants also point to the reduced average annual sales of farm implements in recent years as indicative of the poor financial condition of the farmer. According to an exhibit presented the annual sale of farm implements in tons for the period January 1, 1921, to November 15, 1923, was 27 per cent of the average annual sales for the years 1911–1915. There has been a slight increase in the volume of sales per ton in the past year both in the country as a whole and in the western group. The increase in the entire United States in 1923 over 1922 was said to be about 25 per cent and in the middle western States about 10 per cent. Some farmers stocked up with farm implements during the period when they were receiving high prices for their commodities, and now are buying merely spare parts and in many cases making repairs to old implements. There are, however, no figures of record indicating the extent to which this is the case.

A comparison of individual deposits of all commercial banks in the United States on June 30, 1922, contrasted with 1923, shows that the deposits increased to a greater extent in the States in the western group than in certain other sections of the country. The figures for prior years are not given. In the States of Minnesota, Montana, North Dakota, and South Dakota, as a group, the average increase amounted to 7.7 per cent; in Colorado, Kansas, Nebraska, Oklahoma, and Wyoming, as a group, 8.26 per cent; and in the group which includes Illinois, Iowa, and Wisconsin, the increase was 12.46 per cent. The average increase for the eastern and southern States was 4.95 per cent; for seven of the mountain-Pacific States, 13.65 per cent; and for the entire United States, 7.62 per cent. For all the western States the average increase was 11.27 per cent.

The savings deposits in all banks in the States comprising the western group, with the exception of Oklahoma, Texas, Missouri, and Minnesota, on June 30, 1923, contrasted with June 30, 1922, show increases ranging from 7.15 per cent in Wisconsin to 26.49 per cent in Nebraska. In Oklahoma and Texas there were decreases of 29.94 and 36.63 per cent, respectively; in Missouri 9.09 per cent, and in Minnesota, less than 1 per cent.

The following statement shows the average percentage increase in commercial deposits 1921, 1922, and 1923 over the monthly average for 1920 in the Federal reserve cities named:

	Number of banks	Increase June 30, 1921 [1]	Increase June 30, 1922 [1]	Increase June 30, 1923 [2]
		Per cent	*Per cent*	*Per cent*
Boston, Mass	64	3	6	15
New York, N. Y	30	9	13	21
Philadelphia, Pa	80	6	9	17
Cleveland, Ohio	18	14	11	25
Richmond, Va	92	8	23	29
Atlanta, Ga	97	10	11	29
Chicago, Ill	200	3	3	115
St. Louis, Mo	35	1	10	24
Minneapolis, Minn	15	8	10	24
Kansas City, Mo	58	11	19	31
Dallas, Tex	85	8	18	35
San Francisco, Calif	74	8	14	38

[1] The monthly average increase for 1921 and 1922 is about the same percentage as that reflected by the June 30 figures.
[2] No monthly average increases for 1923 are available.

The total deposits of all member national banks of the Federal reserve (Kansas City) district upon corresponding call dates in September were, in 1920, $947,777,000; 1921, $775,805,000; 1922, $900,346,000; and 1923, $919,672,000.

Complainants produced evidence to the effect that western farmers are paying their debts and short-term loans by increasing their mortgage indebtedness and that foreclosures on farm lands are increasing. The primary basis for the claim is testimony relating to the situation in 15 Nebraska counties and 27 Kansas counties, said to be typical of those States as a whole. In the 15 Nebraska counties the mortgages filed in 1921 exceeded those satisfied by $18,770,582.21; in 1922 the excess of filings was $9,558,243.59, and in 1923 was but $4,214,271.17 over the satisfactions. However, of the mortgages satisfied in 1923, 10 per cent were by foreclosures, as compared with about 3 per cent in the previous year. In the Kansas counties for the first 10 months of 1923 mortgages recorded were $22,848,503 compared with $23,708,039 for the year 1922, $20,214,132 for 1921, and $24,975,789 for 1920. Nothing is shown as to the mortgages satisfied.

Various bankers who loan money to farmers were produced by respondents as witnesses. An official of a trust company in Omaha, Nebr., which loans insurance company funds on farm lands in Nebraska and adjacent States, stated that out of 2,400 loans at present in effect made through his company, aggregating $19,404,621, but 8, evidencing a total of $97,000, were under foreclosure. This witness testified that banks doing business with farmers are better liquidated and have more reserves than in former recent years. Country banks in instances made marked reductions in indebtedness to their correspondent city banks in 1923. At least 150 Nebraska banks have purchased or were planning to purchase commercial paper in the last six months of 1923, although they had not bought such paper for three years. Many loans in the past year have been of a refinancing character, made to secure lower interest. In the case of another trust

company at Topeka, Kans., which had $22,000,000 of mortgages outstanding, representing 4,527 loans, only 32, aggregating $179,000, were under foreclosure at the time of the hearing. The experience of this company was that almost invariably the foreclosures were against the town owner of farm lands who rented his farm. Another bank in Kansas City had mortgage maturities of $7,000,000, representing 1,341 loans, during the period January 1, 1922, to November 1, 1923. All were paid without final decrees of foreclosure, although collection proceedings were begun in six instances.

Great relief was rendered by the War Finance Corporation under the agricultural credits act of August 24, 1921. Advances or loans under this act with banks and livestock-loan companies decreased $121,082,000, from a peak of $194,279,000 in May, 1922, to $73,197,000 in November, 1923. From December, 1922, to December, 1923, there was a decrease in the balance of 41.8 per cent. The month of largest total advancements under the act was December, 1921, when $44,988,000 was advanced. In November, 1923, the advancements amounted to $217,000. Advances for the year of 1923, except December, amounted to $12,224,000, or considerably less than one-third of the amount advanced in a single month in the midst of the depression. During the same period agricultural loans by land banks increased $53,000,000, from $136,000,000 to $189,000,000, or 38 per cent.

The mail-order houses, respondents say, conduct much of their business with farmers and on a cash basis. Their increased business, based on total sales in dollars, 1923 over 1921, was in excess of 37 per cent. The record does not show the extent to which this increase is represented by the higher prices for the articles sold, nor is it shown how much of the increase was in the grain-raising regions of the West. It may or may not have been largely a displacement of business previously done by local merchants.

Many other matters not here specified but related to the economic condition of the farmer were presented and have been considered. Among these are delinquencies in the payment of taxes by farmers shown as to certain sections in this group: The school, high school, and college attendance of farmers' children; automobile registration; automobiles per thousand of rural population, and much testimony by economic and other witnesses as to the agricultural situation in the Western States.

The annual report of the Secretary of Agriculture to the President for 1923, is by the head of the department of the Government coming into closest contact with the farmer. It begins:

> It is a satisfaction to be able to record marked improvement in agriculture during the past year. Prices of many agricultural crops are higher. Cost of production has been lower, and there has been some reduction in prices of the things farmers buy.

The following are other extracts from his report:

Not only will the total general farm income be considerably greater for the year 1923 but this income will buy relatively more of the things farmers need than for some years past. The purchasing power is greater. Hence farmers generally are better off both actually and relatively, and this is reflected in their increased purchases, which in turn has helped general business.

* * * * * * *

The general agricultural improvement noted is most gratifying to everybody and gives renewed hope to millions of farmers who have struggled against most distressing conditions. This does not warrant the assumption, however, that the state of agriculture in all sections is now satisfactory, viewed either from the standpoint of the farmer or from the standpoint of national interest. In many regions agriculture still is at a disadvantage. The adverse influences of which mention was made in my report of a year ago still exist, though less powerful than at that time. The ratio between prices of most farm products and prices of other commodities is still far out of line.

* * * * * * *

As I said in the beginning, the agricultural situation to-day is very much better than a year ago, while the advance made over the terribly discouraging conditions which were precipitated in 1920 and reached the climax in 1921 is nothing short of remarkable. In general there has been steady improvement since the low point in 1921.

In *Rates on Grain, Grain Products, and Hay, supra*, we referred at length to the depressed condition of agriculture as shown by that record. To some extent and in some localities the conditions there narrated doubtless still prevail. Generally, the farmer who raises only wheat is in a worse financial condition than the farmer who diversifies, especially where there have been crop failures because of climatic or other conditions. It appears from the present record that the agricultural industry, both in the western group and in the entire country, although still unsatisfactory, is now in a somewhat better economic condition than when we reached our decision in that case. Our determination in that case required substantial reductions in rates on the commodities named, when the economic condition of the industry was worse than it now is.

In *National Live Stock Shippers League* v. *A., T. & S. F. Ry. Co.*, 63 I. C. C. 107, 116, we said:

Defendants have met the issue thus presented with evidence as to the reasonableness of the present rate structure as a whole, judged by the recognized transportation standards. It has been suggested that to these standards should be added another, that of economic necessity; that the carriers as public servants should bear part of the public burdens; and that we may find unjust and unreasonable a rate structure which is not relaxed to relieve the needs of an industry. Put in another way, the proposition is advanced that we may find existing rates unjust and unreasonable, and require that they be reduced below what would be justified by standards heretofore recognized, because an industry is not prospering. If that be true, then the converse must be true, that at times when the industry prospers we may find justified rates higher than those which under accepted standards would be

just and reasonable. If true of this industry, it must be true of other industries that languish or flourish, now and hereafter; and if true of industries, why not true of localities or individuals? The answer is that the foundations of what is just and reasonable are not set on such shifting sands. Essentially the proposition is not new and has been dealt with and disposed of long ago.

We have had occasion to consider and reject the converse of this theory, namely, that the increased prosperity of the industry might be made the excuse for advancing rates on the commodity it produced. In *Central Yellow Pine Asso.* v. *Illinois C. R. Co. et al.*, 10 I. C. C. 505, 535, we said:

> The test of the reasonableness of a rate is not the amount of the profit in the business of a shipper or manufacturer, but whether the rate yields a reasonable compensation for the services rendered. If the prosperity of the manufacturer is to have a controlling influence, this would justify a higher rate on the traffic of the prosperous manufacturer than on that of one less prosperous. The right to participate in the prosperity of a shipper by raising rates is simply a license to the carrier to appropriate that prosperity, or, in other words, to transfer the shipper's legitimate profit in this business from the shipper to the carrier.

In considering the reasonableness of rates the economic condition of an industry may be relevant as it bears on the value of the service to the industry, and as it may permanently or for a long period of time affect the ability of that industry to pay the rates assessed, but taken by itself it can not be accepted as controlling.

THE "ELEMENT OF VALUE" AS A FACTOR IN FIXING TRANSPORTATION CHARGES

Closely associated with the claim based on agriculture's economic condition is the claim of complainants in No. 14393 that the transportation charges are not proportionately distributed with due regard to the element of value, or in accordance with the proper application of the test of what the traffic will bear. They put in contrast the 1923 and 1913 values of wheat and corn, and then compare the 1923 values of wheat and corn with other heavy-loading commodities, such as salt, coal, cement, and brick. Similarly, contrasts are presented with the 1913 prices of the same commodities. As the 1923 prices of the last-named commodities bear a considerably higher relationship to 1913 prices than do those of wheat and corn, complainants insist that this disturbance of relationships has operated to make these grains now bear a disproportionate share of the transportation burden in the western group. This may be stated in another way. The contention is that a unit of wheat or corn has less power to buy transportation than in 1913, while in the case of the other commodities named there is a relatively increased purchasing power. The lighter-loading grains and grain products are not taken into consideration in making this comparison. The argument

assumes that the relationship which existed in 1913 was proper from the standpoint of value, and makes it appropriate to consider what the freight-rate situation now is with respect to some important commodities stated as having higher purchasing power from the standpoint of the "element of value" than in 1913. The comparison is based on the September, 1923, wholesale prices used by complainants. Movements are shown for distances ranging from 108 to 880 miles:

Commodity.	Freight rate per ton	Value of commodity per ton	Distance (miles)	Proportion, rate to value[1]
Wheat	$2.80	$37.16	108	7.5
Corn	2.50	31.56	108	7.9
Anthracite coal	1.71	9.95	108	17.2
Cement	2.30	8.75	108	26.3
Brick	1.90	7.34	108	25.9
Soft coal	1.53	3.50	108	43.7
Wheat	3.10	37.16	215	8.3
Corn	2.80	31.56	215	8.9
Anthracite coal	2.32	9.95	215	23.4
Cement	3.10	8.75	215	35.4
Brick	2.40	7.34	215	32.7
Soft coal	2.33	3.50	215	66.6
Wheat	4.70	37.16	303	12.6
Corn	4.20	31.56	303	13.3
Anthracite coal	3.10	9.95	303	31.1
Cement	3.90	8.75	303	44.6
Brick	2.80	7.34	303	38.1
Soft coal	2.92	3.50	303	83.4
Wheat	5.90	37.16	400	15.8
Corn	5.30	31.56	400	17.0
Anthracite coal	3.65	9.95	400	36.0
Cement	4.50	8.75	400	51.5
Brick	3.10	7.34	400	42.2
Soft coal	3.46	3.50	400	99.0
Wheat	5.70	37.16	535	15.3
Corn	5.20	31.56	535	16.5
Anthracite coal	4.37	9.95	535	43.9
Cement	4.70	8.75	535	53.7
Brick	3.60	7.34	535	49.0
Soft coal	4.19	3.50	535	119.7
Wheat	6.80	37.16	664	18.3
Corn	6.10	31.56	664	19.3
Anthracite coal	4.86	9.95	664	48.8
Cement	5.40	8.75	664	61.7
Brick	4.09	7.34	664	54.5
Soft coal	4.68	3.50	664	133.7
Wheat	8.10	37.16	880	21.8
Corn	7.70	31.56	880	24.4
Anthracite coal	6.68	9.95	880	67.1
Cement	6.40	8.75	880	73.1
Brick	4.60	7.34	880	62.7
Soft coal	6.49	3.50	880	182.9

[1] Percentage of freight rate per ton to value of commodity per ton.

In the foregoing table the rates on wheat and corn are taken from complainants' exhibits and are in each instance those in effect from a representative shipping point to a primary grain market. The rates shown for the other commodities have been prescribed by us for similar distances on the respective kinds of traffic moving in this general territory. While wheat and corn now purchase less trans-

portation than in 1913, the existing freight rates on these two cereals are relatively somewhat lower when compared with pre-war rates than are freight rates on other commodities. In the table the present rates on grain are in each instance a less proportion of the value than the rates with which the comparison is made. Nothing of record warrants the conclusion that these other heavy-loading commodities, some of which are so-called basic commodities, are contributing less than they should from the "element of value" standpoint. The analysis indicates the influence of the element of value of the commodity in fixing freight rates. Wheat and corn have been accorded consideration in this regard.

In *Grain Shippers' Asso.* v. *Illinois Central R. R. Co.*, 8 I. C. C. 158, 175, we considered complainants' claim that rates on grain were too high in comparison with rates upon other commodities when the relative values of the different commodities transported are considered. We there said:

> The mere statement of this proposition is its answer. Value is undoubtedly an element which should be considered in the fixing of rates. It is often a most important element, but plainly can not be made an arbitrary standard independent of all other considerations. This case certainly shows that in the opinion of those traffic men produced as witnesses the present tariffs do not represent an ideal relation in rates between different commodities, and perhaps fairly shows that if such ideal relation could be obtained the rates on grain are too high as compared with those on some other commodities, especially manufactured articles. But these same witnesses all say that under the practical conditions which now exist this can not be otherwise, and the case is utterly devoid of anything that informs us what the proper basis for a readjustment would be.

The values of wheat and corn are constantly shifting. There has been a spread of at least 34 cents between the high and low contract prices of wheat per bushel at Chicago in each year since 1913. In 1922 the spread was 73 cents, and in 1923, 41 cents. Grain prices are usually the lowest when the bulk of the crop is marketed. With the gradual increase of farm or other storage grain will doubtless move in more uniform volume throughout the year instead of flowing to the market seasonally. To the extent that this takes place, a more advantageous farm price will probably prevail, and the seasonal tax on respondents' facilities will be minimized, with resulting lessened transportation expense.

INCREASES IN OPERATING EXPENSES OF CARRIERS

In previous portions of this report, as in other cases, we have commented upon the financial circumstances of the carriers. The complainants ask us to establish rates on grain, grain products, and hay, which in the aggregate would be lower than those established by the

Director General of Railroads on June 25, 1918, notwithstanding that the expenses of common carriers have greatly increased. Operating expenses of Class I carriers in the western district have advanced from about $790,000,000 for 1915 to about $1,778,785,886 for 1923, or considerably over 100 per cent. Fuel now constitutes 11 per cent of the total operating expenses of these carriers, while during the pre-war period it was about 4 per cent. Pig iron, which in 1921 sold at $21.96 per long ton, at the time of the hearing was $26.26 per long ton; rails advanced from $40 to $43 per ton from 1921 to 1923. The operating ratio of Class I roads in the western district was 67 per cent in 1911, 63 per cent in 1916, and 76 per cent for the first 11 months of 1923.

There have been heavy increases in labor costs compared with the pre-war period. In 1916 the average compensation per hour paid to railroad employees was 29 cents; in 1920, 66.5 cents; and in 1922, 60.8 cents. In the fiscal year ended June 30, 1916, the average annual compensation per employee was $854.26; in 1920, $1,820.12; and in 1922, $1,623.18. On Class I railroads in the western district the total compensation to employees increased from $479,000,000 in 1915 to $1,006,000,000 in 1922. The trend of labor costs seems to be upward. Increases awarded by the Railroad Labor Board at various times in 1923 or made because of awards in analogous cases by that tribunal not entirely reflected in 1923 operating expense it is estimated will result in the following increases per year for the western district roads named:

Chicago, Rock Island & Pacific Railway	$1,580,979
Chicago & North Western Railway	1,449,644
Chicago, Burlington & Quincy Railroad	1,625,658
Atchison, Topeka & Santa Fe Railway	2,355,000
Chicago, Milwaukee & St. Paul Railway	1,936,896
Great Northern Railway	1,500,000

Other petitions for increases are pending on behalf of train, engine, and yard-service employees. Taxes of Class I carriers have advanced from $48,000,000 in 1913 to $136,000,000 in 1923. The cost of operation of railroads must be given due weight. The general percentage of net increase of railroad rates, and of grain and grain products, earlier described in this report, indicates that since 1913 the increase is somewhat less than the relative increment of commodity prices, and considerably less than that of wages. The cost of materials and amount of wages largely determine the cost of railroad operation.

EXPENSES INCIDENTAL TO PHYSICAL HANDLING OF GRAIN AND GRAIN PRODUCTS

Respondents have shown the characteristic physical handling of grain and grain products and the general nature of the expense incident thereto. Much grain either receives transit service or is stopped en route for inspection or reconsignment. Transit often involves out-of-line hauls and more terminal service than is involved in direct movements. Extra charges are, however, often assessed for out-of-line service. Where a car of grain is inspected en route and also receives a transit service at another point, six terminal services are sometimes performed, as against two on most traffic. Much grain is neither inspected en route nor given transit. Grain doors for cars cost $8, with probably 50 per cent salvage. In 1923 the Chicago, Milwaukee & St. Paul Railway expended for cooperage $331,335 in connection with its grain traffic.

Another item of expense is caused by the seasonal flow of the grain to which we have already referred. Cars must be collected and stored at convenient points in the wheat belt, beginning months in advance of the grain movement, to avoid shortage when required. For example, the average number of cars stored by the Rock Island, a typical grain-carrying road, in July and August, 1923, in Oklahoma, Kansas, and Nebraska was 3,228. These were chiefly system cars, but the storage plan entailed a per diem expense of $3,228 per day, because while the cars were stored idle, foreign cars were used elsewhere for which per diem was paid. The per diem expense for the two months amounted to $200,000, and the entire expense of assembling and storing these cars in order to insure prompt and satisfactory service when the peak movement of grain began, was in excess of $400,000. In this, as in other cases dealing with grain schedules, the carriers contend that loss and damage claims on grain and grain products are relatively large compared with those on other carload freight. Most of these matters were before us and considered by us in our report on *Grain, Grain Products, and Hay, supra.*

PRESENT AND PROSPECTIVE FINANCIAL AND SERVICE NEEDS OF RESPONDENTS

In our report in the *Kansas case* we said that respondents' present and prospective financial and service needs should be developed on further hearing. Respondents accordingly produced as witnesses the chief executive officials of representative carriers, who testified in detail as to the capital needs, and the amount that should be spent for additions and betterments in order to keep pace with growing traffic and to provide and insure adequate and efficient service in the

future. The estimated expenditures for the year 1924 of the roads which thus presented their financial needs were the Atchison, Topeka & Santa Fe Railway, $40,000,000; Chicago, Rock Island & Pacific Railway, $20,110,000; Chicago & North Western Railway, $17,500,000; Northern Pacific Railway, Chicago, Milwaukee & St. Paul Railway, and Missouri Pacific Railroad, each $15,000,000; Great Northern Railway, $12,166,000; Chicago Great Western Railroad, $3,000,000; and the Chicago & Alton Railroad, $2,000,000. The plans of the carriers named contemplate annual budgets of similar amounts during the next few years, which, generally speaking, provide simply for improvements, additions, and betterments to meet a normal expansion of commerce.

This testimony supports the generalization in our report in *Reduced Rates, 1922, supra*, page 681:

> It is obvious that large additions to capital must continually be made. Most of the capital will have to be acquired through the issuance of securities which must be sold in the markets of the world in competition with other classes of securities. * * * The carriers must attract money by rates of return and stability of investment. While return must not exceed a reasonable charge against the public served, it must be such as to obtain the needed new capital.

It is usually desirable to raise a substantial portion of additional capital by issues of stock, but in recent years this has not been possible. Such money as respondents in this group have procured has come from issues of bonds.

The Secretary of the Treasury, in his annual report on the state of the finances for the fiscal year ended June 30, 1923, said:

> There is one unsatisfactory feature about the large capital outlays upon the railroads in the past year, and that is that they have been almost wholly provided by borrowing and are represented by bond issues. It is evident that the railroads can not be permanently financed in this manner. Unless a proportion of the new capital is provided in the form of proprietary investment the credit of the companies will suffer, interest rates upon their offerings will have to be advanced, and in the end further borrowing will become impracticable. The public is interested in maintaining the credit and the service of the roads, and especially interested now that their expenditures shall be in 1924, as in 1923, a strong supporting element in the general employment and business situation. The companies have been operating this year under conditions more than ordinarily favorable to earnings, owing to the heavy volume of traffic, but they have not prospered alike in all sections of the country.

GENERAL CONSIDERATIONS

Respondents contend that the farmer did not receive the benefit of the reduction in grain rates required by us in *Rates on Grain, Grain Products, and Hay, supra*, and that he would receive no benefit from any further reduction that might now be made. In support of this contention they present testimony that varying prices

were paid on the same day at different points having the same freight rate to a terminal market before and after our decision in that case; that varying prices were paid to the farmer at the same point on the same day by different purchasers; and that farm prices at a point with a higher freight rate are sometimes higher for the same grade of grain than farm prices at a point with a lower freight rate.

The record, however, indicates that the freight rate to the primary market is considered by the country buyer in fixing his price to the farmer. Theoretically the country price of a given grade of grain should be the terminal market price of that grade less freight and 3 or 4 cents per bushel handling charges, which includes insurance, taxes, and the buyer's profit. But unless local competitive conditions prevent him from doing so, the country buyer allows himself a considerable margin to take care of a fall in the price before the grain reaches the terminal market. Often this gross margin is out of all proportion to the service performed. Conversely, when there is competition, the margin between the terminal market and farm price is sometimes less than the freight rate. It is noticeable from the record before us that where there is competition in the purchase of grain, prices are usually from 5 to 10 cents per bushel higher than at points which have only one elevator but pay no higher freight rate. Moreover, elevators owned or run by associations of farmers usually pay higher farm prices than do line or independent elevators. As the terminal market price of a given grade of grain sometimes varies per bushel in a single day an amount considerably in excess of any reduction here sought, and in some instances in amounts equal to or in excess of the entire freight rate, it would be difficult by a showing of a few transactions to trace a reduction in rates that would on the average amount to but from 2 to 3 cents per bushel. On seven days in December, 1923, the variation in prices paid at the terminal market for No. 2 hard wheat each day was not less than 16 cents per bushel. The varying prices may be accounted for in part by the difference in the protein content of different sales of the same grade. This would also account for the fact that farm prices at points with a higher freight rate are sometimes higher for the same grade of grain than farm prices at points with a lower freight rate. When it is considered that the reductions asked for by complainants would at most amount to only a few cents per bushel, generally not more than 2 or 3 cents, it seems clear that price fluctuations from week to week are frequently as great as a substantial change in freight rates.

But, assuming that the farmer would get the entire benefit of any reduction made by us, respondents present computations based on the production of grain in the different States and the number of

farms in each to show that in the event of a 10 per cent reduction the saving to the average farmer would range from a few dollars to perhaps $25 per year, dependent upon where the grain was shipped. Complainants' testimony is that in 1921 Kansas shipped 35,000,000 bushels of wheat to Galveston and 55,000,000 bushels to terminal markets. Upon this movement, in the event of a 10 per cent reduction in the freight rates to these markets, the average yearly saving per Kansas farm would be about $12.

State and municipal taxes are now from two to three times higher than in 1912. Respondents also point to the high interest rates exacted on farm mortgages. In some of the States where the farmer is in the worst condition financially interest rates on first-mortgage farm loans as of March, 1921, ranged from 8 to 10 per cent on a large proportion of the loans. In North Dakota, for example, 43.6 per cent of the loans were at the annual rate of 9 or 10 per cent, in Minnesota 2.7 per cent, and in six of the other States the percentage of loans at 9 or 10 per cent ranged from 5.5 to 74.4 per cent. In Iowa, Missouri, and Wisconsin the interest rate was generally 8 per cent or less. High cost of production, low prices, and crop failures are also mentioned as causes of the farmer's present condition. But that the farmer could or should have financial relief from these or other sources and that the saving per individual farmer in the event of a rate reduction is small presents no reason why his freight rates should not be reduced if unreasonable.

OUR DUTY UNDER THE ACT AND THE GENERAL PRINCIPLES THAT GOVERN

Agriculture is a basic industry. It creates new wealth. The farmer who multiplies seed produces important traffic for the commerce of the world and capital that never existed. Agriculture produces in the United States yearly a stupendous amount of new wealth. For the last 10 years the average annual value of agricultural products has exceeded $16,000,000,000. If the farmer for an extended period fails to get a fair wage for his labors and a return upon his investment, his adversity must be reflected in other activities in agricultural regions, including the railroads, and, to some extent, in the country as a whole. The Federal Government recognizes the importance of a prosperous agricultural industry. It has exerted and is exerting its powers in many ways to secure such prosperity. As one of the agencies of that Government, possessing a jurisdiction based upon and limited by the grant of authority from the law-making body of the Nation, we are dealing with what complainant contends to be a vital factor in the farmers' present economic condition, namely, the freight rates on certain commodities he produces.

We recognize the importance of agriculture and are in entire sympathy with any lawful measures that may be adopted for its permanent good, but we believe that the part of freight rates in the present economic condition of agriculture has been overemphasized by many. Complainants recognize that the freight rate from the farm to the primary market is no more than one of the elements considered by the country elevator in fixing grain prices to the farmer.

In *Rates on Grain, Grain Products, and Hay, supra*, page 99, we said:

> The prostration of agriculture in this country is the product of world-wide forces. The high level of freight rates has been an obvious and tangible circumstance which has quite naturally been a target of dissatisfaction, but we are not persuaded that it has been more than a minor factor in bringing about distress.

The Secretary of Agriculture in his annual report for 1923, however, says:

> High freight rates still prevail, and, while not the cause of low farm prices, place one more additional burden upon the farmer which he can ill afford to pay in view of the prices he must take for his products; also they place him at a disadvantage with his foreign competitors in world markets in the case of those farm products which we export.

While the official opinion of the head of the Department of Agriculture is entitled to serious consideration, the present record presents no reasons for causing us to change our view as formerly expressed in the case cited. Grain and grain products are moving and have moved freely in the channels of commerce. The freight rates on grain and its products are now on a much lower level than when we expressed the opinion quoted. The amount that would accrue to the average farmer in the event of an assumed 10 per cent rate reduction on grain and grain products as indicated by this record is small. On the other hand, as to some of the respondent railroads, the effect of a reduction in rates on grain and grain products to the extent here asked, in addition to what has already been made, would be little, if at all, short of disastrous. The Chicago Great Western and the Minneapolis & St. Louis, for example, earned but 1.27 per cent and 1.26 per cent, respectively, on their reported property investment in spite of the fact that 1923 was a peak year from the standpoint of traffic handled. Other carriers earned rates of return on their reported property investments as follows: Missouri Pacific Railroad, 2.31 per cent; Chicago, Milwaukee & St. Paul Railway, 2.89 per cent; Northern Pacific Railway, 3.19 per cent; and Chicago, Rock Island & Pacific Railway, 3.90 per cent. A 10 per cent reduction in the rates on grain and grain products would result in an annual loss of $2,492,408 to the Milwaukee, of $1,513,204 to the Rock Island, and of $1,225,000 to the Northern

Pacific. For the first 10 months of 1923 the Milwaukee's interest charges exceeded its net operating income by about $3,000,000.

The bulk of the national grain supply is produced in the West. Only three States east of the Mississippi River produce as much wheat as their inhabitants consume. The West, after supplying its own needs and the shortage in the Eastern States, has a large surplus of grain and grain products which must find markets elsewhere. Much of this traffic must move long distances, and this requires facilities for timely and efficient transportation without which these products would be of little value or benefit. Unless the railroads owning these facilities realize sufficient revenue to enable them to function with a high degree of efficiency, industry and commerce in general, including agriculture, will suffer. During the past year the railroads efficiently handled a large volume of tonnage. For the most part, the transportation industry is in better financial circumstances than is the grain-raising industry. It is of the utmost importance to the welfare of the country and of agriculture that the railroads continue to be maintained in such a state that they can render such satisfactory service. Car shortage and traffic congestion often cause acute financial distress. As stated in the *Kansas case*, *supra*, page 114:

> Of prime importance to the agricultural industry and to the country in general is an adequate and efficient transportation service. The extent to which a marked rate reduction would disable the carriers generally or particular carriers in the performance of this service is of great consequence.

Complainants admit the importance of service to the farmer, and cite past instances when congestion or car shortages caused a widening of the spread between the terminal market and farm prices of grain, to the detriment of the farmer. The governor of the tenth (Kansas City) Federal reserve district testified as follows with respect to the question of service:

> Anything would help the farmer that would save for him—I want to qualify that—if we do not break down the service.
>
> I think we have had no shortage of cars this year, but a couple or three years ago we were deluged over at the bank all the time by certain of our member banks when they could not collect their notes because they could not get cars, and before I came to the Federal Reserve Bank we had 30 country banks corresponding with me in Atchison. We were hammering them on the back to try to get them to pay, but they could not pay because they could not get cars.

In a report made to the Federal Reserve Board by the chairman of the board and Federal reserve agent, Federal Reserve Bank of Minneapolis, the following appears:

> The losses a year ago, due to the heavy shortage of grain cars, stock cars, and in motive power, can not, of course, be accurately computed. Farmers lost their markets through inability to move their crop at the right time. Stock-

men took heavy losses through inability to load at the right time and through shrinkage because of the slow movement to market. The aggregate money losses were in all probability far greater than any amount that freight-rate reductions would have involved. It seems clear that the farmer's outstanding requirement is a full measure of prompt and adequate service. Questions of rates are of far less importance.

Upon the flourishing condition of these two industries, agriculture and transportation, depends largely the country's permanent prosperity. To assist one of them unduly at the expense of the other at a time when neither is in an ideally prosperous condition, merely because one may be in a worse condition economically than the other, would be of doubtful value to the assisted industry or to the country, assuming for the moment that it is within our power arbitrarily to render this assistance. It must be recognized that we can not require unduly low rates on some commodities for the benefit of one class of shippers any more than we can arbitrarily increase rates on other commodities because the shippers thereof may be enjoying excessive profits. On the other hand, if agriculture, as represented by the commodities here involved, has a lawful grievance so far as its freight rates are concerned, it is entitled to have the situation corrected even if it should become necessary to increase rates on other commodities.

We have an illustration of the importance of service in the recent past. In 1920, after the carriers were released from Federal control, when it became apparent that unless the carriers were given financial assistance in the way of increased rates a breakdown in the transportation system of the country might result, the other industries of the country practically with unanimity came before us urging increases. These were granted. Since those increases substantial reductions have been made in the rates on commodities in general, and still heavier reductions on grain, grain products, and hay, the commodities here in issue. The carriers as a whole in the western group have yet to make a fair return on the value of their properties over any considerable consecutive period of time. There has been, nevertheless, improvement in service, but, if further substantial revenue losses are to be sustained by respondents at the present time, the public interest would be directly affected through a further weakening of railroad credit and a lowering of the standard of railway service.

In this situation, our sole function is to administer the interstate commerce act, in conformity with the standard given us by Congress as interpreted by the courts. The shippers' safeguard against the exaction of exorbitant charges is found in section 1 of this act, which provides that "all charges made for any service rendered

or to be rendered in the transportation of passengers or property * * * shall be just and reasonable." The determination of whether rates on particular commodities are reasonable or unreasonable involves many considerations and is affected by many circumstances and conditions. In testing the reasonableness of rates certain prescribed criteria have received authoritative acceptance by us, have been sanctioned by the courts, and are taken as correct expositions of the principles which Congress has intended to be applied. If those advocating reductions in the instant proceedings have met the usual tests of the reasonableness of rates, approved by experience and valid in law, and the rates on grain and grain products and hay are unreasonable, it is our duty under the act to prescribe the just and reasonable rates hereafter to be observed. We so stated in the *Kansas case.*

Our duty is in part set forth in the act in this language:

> In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management, and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

Here, as upon the former hearing in the *Kansas case*, respondents assert that the carriers in the western group have not made a fair return from their operations, and that there is no legal ground for reducing the rates on grain and grain products. Respondents' position is that, if rates on grain and grain products are relatively too high compared with rates on other commodities, the improper relationship should be cured by advancing rates on other commodities, rather than by reductions in the rates on grain and its products. Those advocating reductions insist that shippers are entitled to reductions in rates on grain, grain products, and hay irrespective of whether the carriers are making a return at the rate of 5.75 per cent on the value of their properties. They rely on certain language of the Supreme Court in *Dayton-Goose Creek Ry. v. U. S.*, 263 U. S. 456, 480, to the effect that the statute does not require the use of the net return from all the rates as evidence to fix a particular rate or class of rates. The court said:

> In such an inquiry, the Commission may have recourse to the service done, its intrinsic cost, or a comparison of it with other rates, and need not consider the total net return at all.

This does not forbid us to consider the net return of the carriers but merely says that we need not when considering a particular rate or class of rates. The matter is for our sound discretion. Nor does it limit or qualify our duty under the above-quoted provision of section 15a. If the reduction in the particular rate or class of rates has no substantial effect upon the aggregate carrier revenue there may be no occasion for considering the latter duty. If, on the other hand, it has a substantial effect upon the aggregate revenue, such occasion arises.

The general policy of the law is thus stated by the court in the same decision:

> The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission * * * by fixing adequate rates for interstate commerce, * * * to secure a fair return upon the properties of the carriers engaged.

But even if Congress had not thus announced a fixed policy, being public utilities they are entitled as individual entities to receive from all their rates revenues sufficient to pay expenses and a reasonable return upon the value of their properties, economically and efficiently managed, if obtainable through rate schedules not inherently unjust. The carriers' right to a fair return is based on the fact that theirs is private property devoted to a public use, and, as such, certain rights are safeguarded by the Constitution.

Class I carriers in the western district handled in 1922 74,868,565 tons, or 4,560,509 cars, of the commodities here considered, representing 13.6 per cent of all carload tonnage; grain and grain products furnished 16.1 per cent of the tonnage and over 20 per cent of the total carload ton-miles of 22 Class I carriers in the western district. As expressed by complainants' counsel, "agriculture is preeminently and predominantly the largest industry in these States." The revenue losses which would result from a reduction in those rates to the extent here asked have been shown. The carriers in the aggregate in this group have since Federal control failed to make a fair return in any year in spite of the heavy tonnage of 1923. About 225 short lines in this territory are dependent in large measure upon grain tonnage, which constitutes an even higher per cent of their total traffic than in the case of the larger roads. Generally these short lines in the past few years have all had financial difficulties. In the three years ended in 1921, 151 Class II railroads in the western district incurred a total net deficit in excess of $11,000,000.

The general level of rates now in effect is that resulting from our action in *Reduced Rates, 1922*, wherein we specifically considered whether the commodities now before us should further participate in the general reductions then made. Looking to the future, we then determined that the rates and charges which would result from that decision would enable the carriers to earn a fair return, as qualified in the act. These commodities form a substantial part of all traffic in the western group. The year 1923 was a peak year from the standpoint of tonnage handled, yet the carriers failed to make the permitted return. We have no assurance on this record that there will be such further increases in tonnage in the immediate future, or such reduction in operating expenses as to enable the carriers to make anything in excess of a fair return.

HAY

So far our discussion has been devoted mainly to grain and grain products in the western group, although certain traffic statistics as to hay have also been given. Complainants admit that the rates on hay are not unreasonable when the usual tests are applied. They rely solely on the "value of the service" to the shipper, and claim that present rates are stifling the traffic. But the record shows no market in the country unsupplied with hay to the extent of its needs.

The production of hay in the western group increased from 38,940,000 tons in 1921, with a farm value of $331,284,000, to 43,678,000 tons in 1923, with a total farm value of $456,483,000.

In the first nine months of 1923, 16,263 carloads of hay and straw were received at the Kansas City market as compared with 15,495 and 15,022 for the same periods in 1922 and 1921. In a corresponding period in 1913, 20,381 cars were received.

The average price of the various kinds of hay received at the Kansas City market for the years 1913, 1921, 1922, and 1923 were as follows:

	Prairie hay	Alfalfa	Tame hay
1913	$10.19	$12.52	
1921	9.95	15.71	$14.16
1922	10.18	16.93	13.61
1923* (average for first nine months)	13.18	19.77	14.39

No producers or consumers of hay in the western group appeared at the hearings. Only hay dealers appeared. They claimed that lower rates would increase the volume of tonnage handled at the large markets, and that they would thus be enabled to obtain hay at more remote points and ship to more distant consuming points.

Whether this would result is problematical, as will appear from a later discussion of the evidence relating to the mountain-Pacific and southern groups. The falling off in the movement of hay from the Middle West to southeastern territory is the product of other causes, although freight rates may be a factor. Hay produced west of the Rocky Mountains moves by rail to the Pacific coast, thence by water through the Panama Canal, and as far inland as Memphis, Tenn., Louisville, Ky., and Birmingham, Ala. The southern farmers are also growing more hay or hay substitutes than formerly, and this is a part of the diversification program in the South. Assuming that some additional tonnage might be obtained by a reduction in hay rates, the question is whether Middle West carriers will make voluntary reductions to meet competition of hay from the Far West. Hay is a light-loading commodity, the average load being about 12.5 tons, and now pays relatively less compared with other traffic than in 1917. On seven representative roads in 1917 hay produced 0.81 per cent of the total carload ton-miles and 1.23 per cent of the carload revenue. In 1923 the ton-mile percentage was 0.63, and the revenue percentage was 0.93.

Mountain-Pacific Group

The northwestern States Idaho, Montana, Oregon, and Washington produce a heavy surplus of wheat, but little coarse grain. The rate-regulating commissions of Idaho and Washington urge that low export rates should be established by respondents to move the wheat from producing points in these States to Pacific ports.

Considerable evidence was submitted concerning the financial condition of the wheat farmer and alfalfa grower in the Northwest. In both 1921 and 1922 the Northwest wheat crop was short, and the prices received by the producers were relatively low in those years and in 1923. The return to the average wheat farmer in these years did not defray the expense of producing the crops. Farmers made short-time loans at rates of interest ranging from 8 to 10 per cent, in order to cover these deficits and provide feed and seed for the ensuing crops. In 1923 the wheat farmer's condition was not good, but was much better than during 1921 and 1922. The principal factor contributing to this change was the bumper crop of 1923, when the Inland Empire produced about 60,000,000 bushels of wheat as compared with less than 40,000,000 bushels in 1922. The average production in that section was about 27 bushels to the acre, but average prices were slightly under those of the two preceding years. Wheat producers were able to pay the full crop expense of 1923 to provide the feed and seed necessary for the 1924 crop and in some

instances to make partial liquidation of their indebtedness. While generally deficits were not suffered, little net return was realized. Some progress has been made toward diversification, but wheat must remain the staple crop of that section. The change from wheat to other forms of agriculture is difficult, owing to the added expense involved, and for reasons of climate and soil conditions. The climate is not well adapted to the commercial production of corn, and alfalfa prices are not much above production costs, with a limited market nearby. Sheep raising has been profitable, owing to good wool prices, but here, as in case of other forms of diversification, the initial outlay of the change is large and much of the grain territory is not suitable for sheep ranges. A 10 per cent reduction in rates on grain and hay would be of little assistance to the producers of those commodities in this section, even if they received its full benefit, which is not probable. A much greater cut would be necessary to put the producer on a paying basis. The Public Service Commission of Oregon urges that whatever reduction is necessary for this purpose should be required by us. But the evidence does not show that the grain and hay rates in this section are unreasonable *per se* or by comparison with rates on other commodities. On the contrary, respondents showed that the grain and hay rates from eastern Washington to Puget Sound ports were lower than those on other important moving commodities, including lumber, salt, and cement, to or from Seattle, for corresponding distances. These rates were adjusted by State authorities, after long and careful investigations, in both Washington and Oregon. Interstate rates have been aligned with reference to the intrastate rates in those States, with certain exceptions not material to this investigation.

The grain situation in California is unique. The bulk of the California barley, the principal grain crop, is exported to Europe through San Francisco Bay ports at prices which are said to be satisfactory to the producers. California consumes more wheat than it produces. Accordingly wheat must be shipped in from other States to supply the needs of consumers, as well as for blending purposes. As California is deficit territory, the price of wheat is based on prices at primary markets east thereof, plus the freight rate to California. The result is that a general reduction in wheat rates would automatically reduce the price received by the California farmer for his wheat, hence these shippers make no request for reductions. The Grain Trade Association, composed of California grain dealers, asks that if any reductions be made in the grain rates to eastern or Gulf ports, corresponding reductions should be made to Pacific ports in order to maintain the existing relationship on export traffic.

A surplus of alfalfa hay is produced in northern California and Nevada. A representative of producers of alfalfa in these sections testified that they were "quite happy under existing conditions." Considerable alfalfa moves at a profit from Nevada to San Francisco, thence by water through the Panama Canal to Atlantic or Gulf ports, and thence inland to such consuming points as Albany, N. Y., Louisville and Lexington, Ky., Birmingham, Ala., and Memphis, Tenn. At the date of hearing, the chief difficulty experienced by the Nevada producers was the quarantines laid by consuming States against the Nevada product, because infested by the alfalfa weevil. A number of witnesses appeared on behalf of dairymen around Los Angeles. They stated that under existing prices the production of milk for that city is not profitable, and urged reductions in alfalfa rates from Nevada and northern California to Los Angeles.

Grain rates in California are depressed by water competition on San Francisco Bay and its tributary rivers, including the Sacramento and San Joaquin. The effect has been extended east to Nevada and Arizona points. Formerly a large volume of grain moved from Oregon, Washington, and other northwestern States by rail to north Pacific ports and by water to California. In order to share in this traffic the Southern Pacific published low proportional rates from Portland, Oreg., to San Francisco. Grain from producing States in the western group encounters the competition of the northwestern producers in California. In order to facilitate the free movement of grain from the western group respondents have established relatively low rates from that section to California.

The importance of farming is much greater in Arizona than in many other States in this territory. The chief products are cotton, citrus fruits, dairy products, and hay. The Salt River Valley is the principal producing area of Arizona both as to hay and other crops. Practically 80 per cent of the farms in the Salt River Valley are mortgaged. About half of these mortgages cover the initial farm-purchase indebtedness. About 70 per cent of the farms are mortgaged to their maximum limit. Some of these mortgages cover loans made in part to pay the crop expenses of preceding years. Most of the farmers in this section raise diversified crops. No complaint is made as to the prices received for cotton, citrus fruits, or other crops than hay.

Alfalfa and other hays are produced extensively in the Gila, Salt River, and Yuma districts, and must move long distances to market. To the west alfalfa moves to Los Angeles and vicinity, and meets the competition of California and Nevada alfalfa, which comes in on lower rates. The consuming territory to the east is located in eastern Texas, Louisiana, and the Southeast. To reach this terri-

tory, Arizona hay must move through competing alfalfa-producing districts in New Mexico and west Texas, which, by virtue of the shorter distances involved, enjoy a more favorable basis of rates than the Arizona product. The shippers direct attention to the fact that, due principally to the flat increases in grain and other rates under General Order No. 28, the hay rates to and from Arizona are now relatively higher as compared with grain and other moving commodities than they were on June 24, 1918. This, however, is a general condition, and is not peculiar to the Arizona rates.

SOUTHERN GROUP

In recent years the agriculture of the so-called Cotton States has undergone a radical change. The intensive cultivation of cotton rendered necessary by the advance of the boll weevil has reduced the number of acres of cotton which may be cultivated successfully by a single tenant. If greater acreage is attempted, the result is a crop failure. Hence a large acreage of land, formerly planted in cotton, must either remain idle or be turned to other purposes. To meet this situation, those interested in the success of agriculture in this section have turned toward diversification. They concede that cotton must remain, as heretofore, the staple crop of these States, but for purposes of economy and to prevent the further reduction in the tillable acreage, they urge that each cotton farmer should himself produce whatever food he and his farm animals require. The southern soil is capable of producing such essential commodities, and plans for the diversification and rotation of crops are gradually making headway. Naturally this will result in surplus production of grains and hay by many southern farmers.

Prices of grain in the Southern States are based on the prices at primary markets, such as Chicago, plus the freight rates thence to given points in the South. As the South is a deficit section in the production of grain, that is what would be paid under ordinary conditions. If the rates from such primary markets into the South are reduced, the logical result will be a corresponding lowering of grain prices at southern points. This will react on the diversification program by influencing cotton farmers not only to discontinue their surplus grain production, but also to secure their necessary supplies from the North and West instead of producing them. Every farmer who appeared at the hearing testified that such a reduction, in its effect upon the South, would be nothing less than a calamity. Accordingly, they ask that no such reductions be made in the rates on grain, grain products, and hay from Ohio and Mississippi River crossings to points in the South and between southern points generally.

Although there was practically no demand for reductions, respondents put in an elaborate defense of their rates. They direct attention to the fact that the principal movement of grains in the South is from Ohio and Mississippi River crossings to markets in the Southeast and Carolina territory. They contend that these rates, which we recently found not unreasonable or unduly prejudicial in *St. Louis Merchants Exchange* v. *A. & R. R. R. Co.*, 87 I. C. C. 547, being published to apply any quantity, afford the ultimate consumer the lowest possible transportation cost. They state that the principal movement of grain, grain products, and hay locally in the South is on intrastate rates prescribed by the various State commissions. They ask that no reductions be made in southern territory, in view of the fact that their shippers have not only sought no reductions, but have appeared actively in opposition to such a change.

Eastern Group

In the eastern group the only evidence on behalf of producers was presented by certain witnesses for the Illinois Commerce Commission. The condition of agriculture in this group is generally better than that of the farmer in the western group or in the Pacific Northwest. No shipper appeared at the Washington hearing. Representatives of holders of railroad securities appeared at both the Washington and Chicago hearings urging the financial circumstances of the carriers throughout the United States, particularly in the West, as a reason why reductions should not now be made. The Millers National Federation appeared to state that while they sought no affirmative relief if reductions were made in the grain rates they should likewise be extended to rates on grain products; and that the organization favored equalization of the rates on grain and grain products.

The following table shows the production of grain in the important States included in the eastern group:

	1922	1923
	Bushels	*Bushels*
Illinois	482, 301, 000	545, 070, 000
Indiana	241, 729, 000	280, 834, 000
Ohio	227, 274, 000	258, 704, 000
Michigan	138, 658, 000	134, 530, 000
Total	1, 096, 062, 000	1, 218, 838, 000
New York	78, 421, 000	75, 568, 000
New Jersey	14, 853, 000	13, 919, 000
Pennsylvania	142, 487, 000	128, 712, 000
Delaware	7, 722, 000	8, 377, 000
Total	243, 483, 000	226, 576, 000
New England	23, 036, 000	21, 292, 000

The aggregate value of the cereal crops in the eastern group in 1923 was $993,974,000, as compared with $887,410,000 in 1922. Generally speaking, producers of grain in Illinois, Indiana, Michigan, and Ohio ship the bulk of their grain to near-by markets, often on intrastate rates, and the saving from a 10 per cent reduction in the freight rate would be measured in mills per bushel. The States named produce over 80 per cent of the grain in this group.

The financial and operating conditions of the central territory carriers for the past 20 years were developed of record as were their future financial and service needs. Reductions greater than 10 per cent in the rates from Illinois and western Indiana, both domestic and export, to trunk-line and New England territories were voluntarily made by respondents prior to the general reductions of 1922. For example, the proportional rates from Chicago, Peoria, and St. Louis to the eastern seaboard are now 0.5 cent lower than they were on June 25, 1918. All advances allowed by us in 1920, and 0.5 cent additional have been removed as to these rates. The ton-mile earnings under these rates range from 3.3 to 7.7 mills.

With respect to trunk-line territory, the important movement is on the ex-lake rates on grain and grain products from Buffalo, N. Y., Erie, Pa., and West Fairport, Ohio. No one appeared advocating reductions as to these rates or as to rates generally in trunk-line and New England territories.

The volume of grain and grain products moving ex-lake to Atlantic seaboard points for domestic and export delivery during the 12 months ending October 31, 1923, was 3,888,107 tons. Investigation made by respondents showed that of the grain arriving at Buffalo by lake two-thirds is of Canadian origin.

Present export rates on ex-lake grain are 34 per cent lower than those authorized by us in 1920, as compared with a basis generally but 10 per cent lower on all other traffic in this territory. A further reduction of 10 per cent would reduce the revenues of the carriers of ex-lake grain by more than $1,000,000 annually with no assurance that there would be any resultant benefit to the producer either in price or in ability to ship more grain. Canada ships grain through Montreal. The Canadian roads equalize their rate to Montreal with those maintained by the United States trunk-line carriers to eastern ports. It is not likely that a reduction in the rates in ex-lake grain would have any other result than to induce a similar reduction of the rates by the Canadian carriers, which would leave the American grain in the same relative position as before, so far as Canadian competition is a factor.

Hay moves at fifth-class rates within trunk-line territory, a basis approved by us in *National Hay Asso.* v. *M. C. R. R. Co.*, 19 I. C. C.

34. The average loading of hay is about 22,500 pounds. With slight fluctuation, the farm acreage and production of hay in this territory has remained practically constant for many years. In 1923 its farm value was estimated at $212,975,000, as compared with $202,317,000 in 1922, $181,656,000 in 1921, and $134,998,169 in 1909.

SUMMARY AND CONCLUSIONS

We may summarize the situation as developed of record. So far as relates to the western group, it appears:

(*a*) That rates on grain, grain products, and hay, generally speaking, are now on a somewhat lower basis compared with pre-war freight rates than are the carload rates on other traffic.

(*b*) That the earnings per car, per car-mile, and per ton-mile on grain and grain products, compared with other classes of traffic and with all carload traffic, do not show that grain and its products are now contributing more than their fair share to the revenues of the carriers in this group, considering the value of the traffic, the average hauls, the relative services performed, and the ratio of revenue produced by grain and grain products to total carload revenue compared with former years.

(*c*) That there has been an increase in the average loading of grain and its products in recent years as well as in the average loading of all carload traffic, although not to the same extent in the case of all carload traffic. This factor was given weight in *Rates on Grain, Grain Products, and Hay*, *supra*, wherein we required reductions to be made in the rates for the transportation of these commodities.

(*d*) That there has been slow but progressive improvement in the economic condition of agriculture in the western group since 1921, though the improvement in grain-raising areas is less than with respect to other classes of agriculture.

(*e*) That the present adjustment of rates on grain and its products from the "element of value" standpoint, compared with the other heavy-loading commodities moving in volume, pointed to by complainants, as profiting by the disturbance in relative values, is not unfavorable to grain and grain products.

(*f*) That despite a peak year in 1923 from the standpoint of traffic handled, it does not appear that respondents made a fair return, after giving due consideration to the complainants' contentions as to abnormal expenditures for maintenance of equipment, and to the aggregate valuation.

(*g*) That we have no assurances on this record that there will be such further increases in tonnage or such reductions in operating expenses in the immediate future as to enable respondents to earn an

excess over a fair return. Any further reduction in revenue would increase the shortage in the fair return of carriers in the western group.

(*h*) That large additions to capital must continually be made by carriers in this group for needed additions and betterments, which can not be done if the credit of the carriers is seriously affected by undue impairment of their net revenues from operation.

(*i*) That the benefit which would accrue to the average farmer in case of a reduction in rates is small compared with the aggregate disastrous effect on certain of respondents' revenues and on their credit, and there is serious doubt whether farmers would not in many instances lose from impaired railroad service more than they could possibly gain from a reduction in rates, even if the farmers would get the entire benefit of any reduction made.

No extended summary with reference to the other groups appears necessary. Generally speaking, economic conditions in all these groups are better in 1923 than in the prior years. Moreover, with the exception of certain parts of the territory embraced in the mountain-Pacific group, no reductions are asked, and in the southern group it appears reductions of grain rates would have an unfavorable effect on agriculture generally.

In reaching our conclusion we are mindful of the opinions held by many that there should be a general revision of the rate structure of the country to give basic commodities more consideration. All we here decide is that under the facts and conditions shown by this record and viewing the present structure as a whole, the existing rates on grain, grain products, and hay are not unreasonable when the usual tests are applied.

For the sake of clarity we add that our conclusion is not based upon the sole ground that the carriers as a whole in the western district are not making their fair return. That is only one of the considerations. Still less do we consider that when the rates assailed are shown to be unreasonable the commission's hands are bound so tightly by the provisions of section 15a of the interstate commerce act that we can not grant any general reduction of the nature before us unless and until the interested carriers as a whole in their respective groups make a fair return.

The present rate structure is largely the result of commercial and transportation conditions, and under it the trade and commerce of the country have grown up. Any material disturbance therein will have a tendency to cause disruption of business conditions generally to the detriment of an orderly conduct of commerce and with possibly serious effects upon large sums of invested capital and upon the steady employment of labor. Any marked readjustment might mean the moving of industries from points now near the source of

supply of raw materials to points farther distant. A revision involves an undertaking of magnitude and requires a large expenditure of funds not at present at our disposal. Many of the rates here assailed were prescribed by us, and, over a long period of time, we have been constantly engaged in readjusting and prescribing rate schedules on these and many other commodities. Since the act to regulate commerce was enacted, and probably during a much longer time, traffic conditions and commercial conditions have been adjusting themselves to the existing relation of rates. It is not enough that the present conditions may not be ideal; it must appear that something better is attainable.

Upon all the facts of record we find that the general basis of rates, charges, regulations, and practices of carriers subject to the interstate commerce act for the transportation of grain, grain products, and hay in interstate or foreign commerce, brought in issue in these proceedings, are not unreasonable or otherwise unlawful. The complaint in No. 14393 will be dismissed, and the investigation in No. 15263 discontinued: We will enter orders to that effect.

POTTER, *Commissioner*, concurring:

I concur in the statements of fact and in the conclusions of the majority report that it has not been shown that the rates on grain, grain products, and hay are unjust or unreasonable either in and of themselves or in relation to rates on other traffic, and that the complaint must be dismissed. The report, in my judgment, does not recognize as it should, as bearing upon the question as to whether rates are fair and reasonable, the right of carriers to receive a fair return upon the value of their property. It is my view that the commission is not empowered to make a general reduction in rates applicable on specified classes of commodities without regard to whether or not the carriers receive a fair return on the value of their properties from their aggregate traffic. When, with a movement of traffic in normal volume, the aggregate which the carriers receive is not sufficient to pay a fair return on the value of their property, we are not authorized to require a reduction on particular classes of traffic without protecting the carriers by allowing offsetting increases on other traffic. A determination on this question will involve vastly more than the amount involved in this case regarding rates on grain and grain products. I desire to set forth my position on this question and upon some other pertinent aspects of the situation.

Our duty is to require a rate adjustment that aims at a fair return to the carriers for their services in the aggregate and that fairly will distribute the burden over all traffic. Where we find that one class pays too much we must find that another pays too little unless the total return is adequate. Our power is limited to

establishing a fair relation between commodities and shippers. Changes must be made upward as well as downward. We must do the whole job or none of it. We may not go only half way and stop with a reduction. The carriers have not received and are not receiving the return in the aggregate which the law recognizes as fair. If, under such circumstances, rates on one class of commodities appear high in relation to others, the latter may be too low. We may not assume that certain rates are reasonable in order to obtain a standard by which to measure others. Our task is to correct error, whatever it is, and we can not do it without taking a comprehensive view of the entire adjustment.

It is true that section 15a provides that we "shall have reasonable latitude to modify or adjust any particular rate which may be found to be unjust or unreasonable." The power there given is limited to "any particular rate." The unreasonableness contemplated is relative unreasonableness. It involves in substance a question of prejudice or discrimination as between commodities or shippers because of some particular situation which throws a particular rate out of line with the general adjustment. It does not authorize a general reduction on a class of commodities, as is sought in this case, without regard to whether particular rates are too high or too low. Undoubtedly there are situations where, between certain points, certain grain rates are too low and between others are too high. Correction of such specific situations is authorized by section 15a. Such is not this case. Here a reduction of all is desired no matter whether particular rates are too high or too low. Effort has not been made to show that particular rates are out of line. We are not urged to correct the adjustment, but to make a general reduction pure and simple. Where an adjustment is not correct, because some rates are too high and others too low, it is folly to say that all should be reduced as unreasonable.

Conceivably grain and grain products, foodstuffs, or other essentials might bear a disproportionate part of the transportation burden compared with other commodities less essential or of different character. If now we were undertaking to readjust the general transportation burden, with a view to a more equitable distribution of it, we might require reductions on certain commodities and permit increases elsewhere. We have not undertaken that task. Knowing that the carriers are not receiving a fair return in the aggregate we may not require a general reduction on certain commodities without at the same time authorizing balancing increases on others, and without determining their proper relation to each other.

The view that in determining the reasonableness of rates weight must be given to the right of carriers to a fair return upon the value

of their property is not based on section 15a but on the common law and constitutional right as it existed and still exists independently of that provision. That section has not enlarged the right of carriers to a fair return. It was designed as a practical guide and plan for safeguarding the rights of carriers and shippers and to assure a consistent policy in carrying out the law which theretofore existed. It contemplates a rate basis which would yield a fair return on railway properties generally if the distribution of traffic movement corresponded with the distribution of values. In that event each carrier would receive exactly what the law has always said a carrier is entitled to. It does not guarantee a return but rather operates against the carrier as a restraint. It only permits a carrier to earn a fair return if it can. If it does not earn a fair return, it does not get it. If it earns more than a fair return, a part of the excess is taken away from it, as would not be the case except for that section.

In order that the public may be provided with efficient transportation it is essential that by some means a fair return on the property devoted to the service be provided. Railways are not charitable institutions and no one is entitled to their service without making full payment for it. This would be true if through the Government railways were publicly owned. It is equally true now when they are owned directly or indirectly by upward of 50,000,000 people. The producers of agricultural products do not want service on any other basis. There is no honest way to maintain transportation facilities other than by payment by the shippers who use the facilities. The burden of such payments in the aggregate fairly must be distributed among such users. Under public ownership there would be temptation to compel some to pay for what others receive either by taxing the public to pay for transportation or by shaping the rate adjustment to favor particular shippers. Our duty is to prevent such vices. It is certain that present owners are not receiving from shippers as much as the Government would have to require if the railways were publicly owned.

Railways are private enterprises, but they perform a public function, and because they do must have regard for public right. They are subject to regulation only as may be necessary to protect that right. Regulation to protect the public right must not involve invading the carrier's private right. Such invasions are confiscations. The private right of a carrier is to receive in the aggregate from a traffic movement in normal volume a fair return on the value of its property devoted to the carrier service. The public right pertains only to an excess above a fair return. As to that excess the public right to regulate is dominant. Up to the point of fair return the private right is dominant, and may be interfered with only to pre-

vent discrimination and prejudice among shippers in their relation to one another.

I am willing to go far in recognizing that changes in the rules of rate making were affected by the transportation act. Under that act where a fair return is assured we are not so limited as formerly to a consideration of the relation between cost of handling of particular commodities and the returns from the application to them of existing rates. We may fairly apportion the aggregate in fixing rates on different commodities. To some extent we are at liberty to distribute the burden where, from the public standpoint, it can best be borne. We have a duty, unperformed, to iron out the rate structure. It may be that a broader consideration of the general adjustment would lead to a reduction of rates on products of agriculture. Essentials which supply food, clothing, heat, and shelter may have preference over other commodities in the distribution of the aggregate burden, but their essential character affords no basis for preventing a fair aggregate return. Perhaps we have fallen short in the performance of our duty in not studying more thoroughly the general subject. Such study is essential before sound action can be taken. Up to the point where operations show a surplus above a fair return earnings under rates free from undue discrimination or prejudice belong absolutely to the carriers. They may not be taken away from the carriers except through exercise of the taxing power. This is the essence of property right applicable everywhere at all times to all persons under all circumstances and conditions. The producers of agricultural products would be the ones to suffer most from a violation of this right. There may be thought, or lack of it, that would jeopardize this principle. The air even in high places may be tainted with confiscation, but it is not for us. The Congress has not commanded us to violate the fundamental law.

No one may ask more than to have the aggregate burden fairly distributed according to the ability of traffic to bear it. To make possible and facilitate traffic movement is a sound principle of rate making. Grain and grain products are moving and would continue to move even under higher rates. It is not claimed that reduction would increase the movement of grain or its products. The most that is claimed is that producers would be benefited. It is by no means certain that this would result. The amount per bushel, or per one hundred pounds, involved in the reduction asked for, would be no more than current market fluctuations from day to day. The middleman or dealer might benefit but not a penny would ever reach the producer.

About 85 per cent of all the shippers pay to the carriers is used to pay operating costs and taxes. If the owners of the railways

were to receive nothing for the use of their properties, which we have found worth more than $20,000,000,000, rates could not possibly be reduced under present conditions of high costs of everything the carriers use by more than 15 per cent. A general rate increase which would assure a fair return to railway owners, improve railway credit, encourage betterments and expansion, and stimulate purchases, would help the farmer by increasing the demand for his products and improving the prices which he receives. An increase would probably be the best thing that could happen to the entire country. A general decrease would be certain to bring disaster and the producers of agricultural products would suffer most. We are passing through a serious period in world affairs. Times are out of joint. Discontent breeds criticism. We are suffering an epidemic of selfishness, greed, high living, extravagance, and waste. Railways are kicked and cuffed because of habit and because they are within the easy reach of the discontented and disgruntled. The farmers and railways should pull together. Their interests are identical. They share alike in prosperity and adversity. Each class should do for the other all it can. They both suffer under low prices for what they sell and high costs for what they buy. Both are at a disadvantage as compared with practically every other industry. High costs of production and distribution hit them both alike. They should take up fundamental problems together and in cooperation. They should work with one another for mutual benefit.

In wage scales of upwards of $20 per day in the building trades, coal mining, and other industries, a wasteful marketing system, and undeserved profits to middlemen may be found the basis for most ills. The friends of the farmers and the railways, if they really want to be of service and remove cause for discontent should together undertake correction of these common ills. Unfortunately those who make the loudest proclaim of friendship are not always the best friends. The farmers ask only proper regard for their rights, and they respect the rights of others. They want to pay what is right and fair for what they get. Agencies that would do marauding on their behalf mistake the character of their principals.

The talk about the freight rates on farm products and the transportation act, 1920, as being responsible for, or having the slightest effect on, the condition of any part of the agricultural industry is a colossal exhibit of unsoundness and insincerity. We should say what the well-informed know, that they have not the slightest effect on the prices the farmer receives for his products. Haul them for nothing, and he would not be a bit better off. The most that is claimed for a reduction is that it would have what is termed a

psychological effect upon the farmer. It is supposed he would think he is being benefited. The farmer would not be fooled very long by such deception. At least as far as my vote is concerned, the transportation act, 1920, has operated to encourage rate reduction. In *Reduced Rates, 1922*, we required a rate reduction. I voted for it. I then apprehended that the reduction, by weakening the carriers, would injure rather than benefit shippers. I would not have voted for the reduction had I not then felt that the transportation act, 1920, required me to do so. I so stated, in effect, in a separate expression concurring in the decision of the majority.

It would be easy to become enthusiastic over the plan suggested by one of the dissenters to put such pretensions to the test if some honest way could be found to get the money to do it with. It is difficult to go along with a proposition to take this money from the railroads. Just how we are authorized to take away from them twenty or thirty millions of dollars a year to prove that some one else is wrong, and that after all the carriers are entitled to this money, I can not see.

The aim in regulating a public utility is to work out a just relation between those who provide it and those who employ it. This means, in the case of a railway, the security holders who provide the property, their agents and representatives who operate it, and the shippers who use it. The rights of each class must be considered at every point and the same rules of fairness must be applied to all. Neither is entitled to preferential consideration under any circumstances or conditions. Fair compensation to owners for the use of their property, fair play to those who operate it, and fair charges to those it serves, must be the thought, and protection for all must be worked out at the same time in every adjustment, with equal consideration for everyone. It would be wrong to accord to owners an excessive return on the value of their property which could be obtained only by charging rates too high or paying insufficient wages. It would be wrong to fix rates so low that they would be insufficient to pay a fair return to owners of the carriers or fair wages to their employees. It would be wrong for labor to demand so much that it could be paid only from excessive charges against shippers or by denying carriers a fair return. There is no such thing as a fair and reasonable rate in and of itself. It is a rate that is fair and reasonable for all concerned.

It is our duty to require rates that will protect shippers and carriers. It is the function of the labor board to make an adjustment fair to labor on the one hand, and shippers and security holders on the other. It is admitted that the carriers are not receiving a fair return. We are not at liberty to conclude that labor

is getting too much. Labor is entitled at all times to make proper endeavor to improve its position. It is primarily the duty of railway managers to protect shippers and security holders against exorbitant labor demands. In the event of a disagreement, it is the right and duty of carriers and employees to submit their differences to the Labor Board. In these days when organized employees of carriers generally act in unison, it is essential, in order to protect the public, that carriers act similarly in cooperation, with due regard for the interests of all. It would be wrong for labor, in striving for an increase, first to concentrate attack on a particular carrier which, because of its showing of earnings, could easily afford to make concessions, chargeable in part, perhaps, to the recapture fund. The capitulation of such a carrier would naturally force the acceptance of the same adjustment by other carriers who could not afford it and thereby the public would be injured. Both the attack and the capitulation, under the circumstances, would be wrong. In large part the present adjustment has had the express sanction of that board. In part it has been accepted by management without resort to the Labor Board. Perhaps railway managers have shown disregard for shippers in according wage increases without the approval of the Labor Board. Be that as it may, employees can not be criticized for accepting what the railway managers were willing to accord. Furthermore, where management and labor make an adjustment which is unfair to the public, the Labor Board has the right to suspend it. It has not done so. We may not conclude that wages are excessive. Under these circumstances and in view of the fact that the railways furnish the cheapest service the farmers have, and that existing rates on grain and grain products have, in the main, had our approval, there is no warrant for a general reduction.

The law of supply and demand applies, and there is no way to escape from it. Prices go up when there are more who want to buy than there are who want to sell, and they go down when there are more who want to sell than who want to buy. While it is unfortunate that the prosperity of the farmer during the shortage of the war period was followed by adversity, in the present surplus period both conditions are due to the operation of economic law which can not be affected by anything we are authorized to do. Low prices are not in themselves the basis of distress in agriculture. They are results, not causes. The basic ill is overproduction. Correct that and prices will adjust themselves to a satisfactory level. As long as there is a surplus above the market needs the competition of producers for the market will force the prices down, no matter what the freight rate is, and even if it were entirely removed. If the farmers' dollar is not worth as much as other dollars it is because they have made it so by excess production. Their dollar is, in fact, worth as

much as any dollar. The trouble is that competition among themselves forces them to give up too much for it. Excessive production is the instrument that does self-inflicted damage. This is the whole story and explanation of the wheat farmers' present plight. The country needs for domestic consumption and for seed about 600,000,000 bushels of wheat per year. As long as conditions remain as now in the foreign market a crop of that size will be worth more to the farmer than 800,000,000 bushels, and the cost should be from 15 to 20 per cent less. If producers are misled to excess production by expectation of a foreign market which is not realized, the railways should not be expected to bear their loss. Charges of carriers have been low when compared with other costs between producers and consumers. For furnishing cars, power, and for hauling and management the compensation of the railways averages about one cent per ton per mile of haul, and for that compensation they throw in a large amount of storage facilities for producer, dealer, and consumer. The charge of one cent per ton per mile is creditable when compared with a charge of $1 per ton per mile before the receipt or after the delivery of traffic by the railways. Nowhere else is so much capital and ability rendering such service for such small compensation.

Whatever may be the condition of those who use it, efficient transportation is always needed and must never be imperiled. Carriers have a duty to consider shippers at every point, but the first and most imperative obligation of the carrier to the shipper is at all times to be in condition to render the needed transportation service. The sound national policy under all circumstances and conditions is consistently to increase the efficiency of the transportation machine. Other industries may have their ills and in due time recover, but without transportation they can not survive. In 1922 producers of agricultural products believed they lost hundreds of millions of dollars because not afforded adequate transportation. We must, therefore, be on guard to see that temporary distress in other quarters shall not lead to sacrifice of transportation. Duty in this regard does not rest solely on the fact that transportation service is always needed. The carriers are the best supporters of other industries as buyer and consumer directly and through those who operate and maintain them. Let the carriers slacken in their purchases of locomotives, cars, rails, steel, lumber, machinery, and coal, and millions in other industries lose their employment, reduce their consumption and buying power. Just now, although the wheat farmer is in distress, the producers of corn and hogs are better off. A setback for the carriers, with resulting effect upon employees in other industries, would make the condition of the wheat growers worse and at the same time so drastically reduce the consumption of beef and pork as to seriously injure farmers generally. Beef and pork are

eaten in largest quantities when men are profitably employed. The farmer should be concerned when surplus stocks pile up in manufacturing establishments.

When an agency of Government is urged to take action to correct an evil, it is necessary to consider with what agency the duty lies. There is an evil and the farmer is the victim. The action necessary to correct it is not within our function. We have to do with transportation, and transportation is not at fault. The cause of distress is overproduction. As between the farmers and the railways, the farmers are to blame and have no right to call on the railways to bear the burden. There may be some one else to whom they have a right to look. The present condition of overproduction largely is due to the fact that during the war the farmers were induced to increase production in the public interest. Perhaps that fact entitles them to look to the public for fair protection and for some assistance in carrying the burden which the representatives of the public asked them to undertake. In that aspect it is not a question of price fixing or of interference with the laws of supply and demand. It is a matter of good faith and common honesty to do justice in a situation which may never occur again.

There is an aspect which may warrant some permanent plan reasonably to protect the producers when there is an unexpected surplus of essential foodstuffs. The ideal situation would exist with production in such quantities that the market, under the application of the law of supply and demand, would take it at fair prices covering cost and reasonable profit. That ideal is not attainable. As already pointed out, the country needs for domestic consumption about 600,000,000 bushels of wheat per year. If the farmers could, under a plan of production control, limit their crop to that amount, the prosperity of the wheat farmer would be assured. The idea of production control is not popular, for it is thought hostile to the interests of the general public. There are 110,000,000 consumers of wheat products. The average consumption per capita per year is the flour from five bushels of wheat. Probably not more than 2 or 3 per cent of them are wheat growers. The consumers want low prices, and are not apt to worry much about the producer. They reason that the greater the production the lower the price and the better for the consumer. Sometimes it is overlooked that the public and its representatives always should be fair. But perfect production control is not possible because of the uncertainty of weather conditions. If planting was for a production of 600,000,000 bushels under normal conditions, a partial crop failure would cause indescribable distress. The public interest demands insurance against that possibility. Planting must be in an amount sufficient to assure adequate supply under unfavorable conditions. This means that under

exceptionally favorable or even normal conditions there may be a surplus. This surplus, which the public interest requires shall be produced, will distress the farmers unless there is a foreign market for it. As the public needs the protection which the surplus affords, perhaps the public should pay for that protection and assume some responsibility for disposing of the surplus in foreign markets and so as not unduly to depress domestic prices. Plans to accomplish this are now before the Congress. A solution of the problem may be in prospect. Whatever may be the soundness of the plans under consideration, they have the great merit of honestly recognizing that the problem is for the public and that in justice it can not be shunted to the railways. The real task is for the Congress, and not for us.

I am authorized to state that COMMISSIONER COX joins in this expression.

MCCHORD, *Commissioner*, dissenting:

In the main I concur in the dissenting views expressed by COMMISSIONER CAMPBELL, but I do not agree that the reductions which should be made in this case should in any way be conditioned upon contemporaneous offsetting increases in rates on other traffic. It would be the appropriate time to consider that question when, the reduction in rates on grain and grain products having been made effective and the results on the carriers' revenues practically determined, the carriers shall have petitioned for increases and have shown that they are entitled to them.

I am authorized to say that COMMISSIONER MCMANAMY concurs in this expression of dissent.

EASTMAN, *Commissioner*, dissenting:

While I agree with much that is said in the dissenting opinion of COMMISSIONER LEWIS my point of view is sufficiently different, I think, to justify a separate brief statement.

The most pressing economic question now confronting the country is that which has been created by the situation in the grain-producing industry, particularly west of the Mississippi River. If it can lawfully be done, it is highly desirable that the freight rates on grain and grain products be reduced. Such a reduction would be of no great material help to the farmers, for the harmful effect of the present freight rates has been much exaggerated; but it would, no doubt, be of some assistance, and at all events it would clear the air for the consideration of issues which have greater pertinence.

These rates can not lawfully be reduced, however, unless they are now unreasonable. No mathematical formula can be applied in the determination of this question, for none has ever been devised. The freight rates of the country conform to no logical system and are

capable of no scientific measurement. They are what might be expected of an industry which, while monopolistic in important respects, is yet subject to many different forms of competition. Perhaps the most important factor in their construction has been "what the traffic will bear." Public regulation of specific rates has been largely a matter of judgment, guided chiefly by comparisons.

These being the facts, are we justified in finding that the rates here in question are unreasonable? The test must, I think, be the preponderance of the evidence, weighing it in the scales of judgment in the way to which we have been forced by the lack of scientific principles of rate making. It is undoubtedly a close question, but I believe that the conclusion is warranted that the rates on grain and grain products in western territory are unreasonable; and in this opinion I am influenced chiefly by the fact that this traffic, more particularly wheat, now seems to be bearing more than its fair share of freight charges, taking into consideration the volume of movement, the loading and other transportation characteristics, and the trend of relative values in recent years.

The majority have, I feel, given insufficient weight in their comparisons of car-mile and ton-mile earnings to the principle, generally accepted in rate making, that such earnings should decrease as the length of haul increases. Not only is the average haul materially greater on grain and grain products than in the case of all carload traffic, a disparity which is increased if products of agriculture are excluded from the latter total, but as a matter of fact the average car-mile and ton-mile earnings for the total are swollen by the fact that the average hauls on such low-grade commodities as sand and gravel and iron ore are comparatively short. This is merely an indication of the great care which must be exercised when such comparisons are employed. When proper allowances are made, it seems to me that they support the conclusion that the rates on grain and grain products are unreasonable. Of even greater significance are comparisons with individual commodities or commodity groups. Thus the average haul for wheat on 10 large roads in 1923 was 256 miles, the average car-mile earnings 42.63 cents and the average ton-mile earnings 1.079 cents. In the case of the comparatively high-grade commodity group "other manufactures and miscellaneous" the average haul was 241 miles, the average car-mile earnings 32.3 cents, and the average ton-mile earnings 1.44 cents. The similar figures in the case of "chemicals and explosives" were 275 miles, 39.85 cents, and 1.375 cents. In the case of "paper, printed matter, and books," they were 289 miles, 26.22 cents, and 1.034 cents. Many other similar comparisons could be given.

But having reached the conclusion that the rates on grain and grain products are unreasonable, we at once run afoul of another

part of the law, namely, the provisions of section 15a which require us to maintain rates, so far as practicable, at a level which will produce aggregate revenues yielding a certain return upon the value of the railroad properties. Using the value which the commission has found, the carriers in the western district plainly have not been and are not now earning such a return. I have never joined in that finding of value, believing its ascertainment impossible until we have progressed much further in our valuation work. At best it is but a semi-informed guess, but it has received the sanction of the commission and I am able to substitute no other value. Employing this standard, then, there is now a deficiency in the western district, measured by the provisions of section 15a, and this deficiency will be increased if the rates on grain and grain products are reduced.

Nor would the situation be greatly different if section 15a did not exist. Facing facts squarely, as we should, the country must educate itself, if it believes in private initiative and wishes its railroads privately owned and operated, to accept the terms upon which private capital is willing to do the job. Granting the premise, I know of no escape from the conclusion. To avoid misapprehension, I may say that I am not a devotee of private initiative in the public business of maintaining and operating the nation's highways; but that is a question which we are not now facing.

Under the law, then, it follows that if we reduce the rates on grain we must afford the railroads every practicable opportunity to make good the deficiency by raising rates on other traffic. This brings us to a theory which has gained great vogue of late, namely, that the rates on grain and other so-called basic commodities can and should be reduced at the expense of rates on other commodities of less basic importance and of higher value. This theory has been accepted by so conservative a body of business men as the United States Chamber of Commerce and has become a part of the platform creed of both of the great political parties. It has the advantage of being a theory under which it is possible to be for the railroads and for the farmers at one and the same time.

Continuing to speak frankly, such knowledge of the railroad rate structure as I have does not inspire me with confidence in the practicability of this theory; but it is quite possible that I am too near to the subject for proper perspective and overimpressed with its complexities and difficulties. Clearly it is highly desirable and in the public interest that the country should know as soon as possible whether this theory, which has gained such impressive support, is really sound and constructive or whether it is no more than a bit of political hypocrisy, of which we have a surfeit. There is no better way of ascertaining this fact than by putting the theory to the test, and no easier test could be found than this case offers. Compared

with the aggregate of freight revenues in the western district the reductions which are sought in the grain rates would not bulk large, and in such a situation the theory should work if it will work at all. I am sorry that we are not going to try it out.

CAMPBELL, *Commissioner*, dissenting:

The carriers upon argument urged denial of the request of complainants for a reduction in the rates on grain, grain products, and hay on the ground, among others, that the carriers as a whole in their respective groups are not making the stated return of 5.75 per cent upon their investment. It is in effect an argument that the carriers as a whole in those groups must make in excess of the fair return before the shippers of any particular commodity, no matter how hard its economic straits, can secure relief at our hands.

In 1923, according to monthly reports to the commission, taking into account complainants' claim for the amortization of alleged excess maintenance, the rate of return on the Class I carriers in the western district was about 5.36 per cent. Only a few of the carriers suffered deficits and a number of them returned more than the fair return. Compare this condition with that of the average farmer in the western district. Instead of making a net return equivalent to that of the carriers he struggled along with no net return at all, and thousands of farmers suffered deficits which added considerably to the almost unbearable burdens which they had to carry because of the economic conditions in the several preceding years. The majority correctly find that the farmers' condition in 1923 showed improvement over that in 1922. Nevertheless in 1923 about 17.5 per cent of the bankruptcies were farmers, a substantial increase over preceding years. Bank failures in 1923 in the heaviest grain-producing States in the western district showed a marked increase over preceding years. The majority find that these conditions are in large part due to the recession since 1920 in the price of the farmers' products, but the knowledge of that fact will bring little comfort to the farmer, who must have help until his slowly improving economic condition enables him to meet his obligations without further borrowing. The argument of the carriers that we can not extend this help because the carriers, as a whole, in the western district are not making their fair return is not at all persuasive. If, as contended by the carriers, the commission's hands are bound so tightly by the provisions of section 15a of the interstate commerce act that it can not grant any general reduction of this nature, no matter how much proof of the unreasonableness of the rates assailed, unless and until the interested carriers as a whole in their respective groups make a fair return, then that section of the act is a hindrance instead of a help to the economic welfare of the general public.

I am persuaded that the economic condition of a particular industry, more especially that of farming, which I consider the basic industry of the country, should be given considerable weight in determining under section 1 of the act whether the transportation costs which that industry has to bear are unreasonable.

But laying aside for a moment the economic consideration and taking up others which are vital in determining the issue of unreasonableness under section 1: In 1923 ten roads in the western district showed an average loading on all carload traffic of 29.31 tons, as compared with grain and grain products of 32.57 tons; average haul of 213 miles, as compared with 267 miles for grain and its products; and revenue of $68.17 per car and 28.46 cents per car-mile, as compared with $79.48 and 29.76 cents on grain and grain products. On these 10 roads in 1923 grain, grain products, and hay contributed 15.2 per cent of the total loaded car-miles and furnished 15.5 per cent of all carload revenue. Of 41 commodities, 16 yielded lower revenue per car-mile than the average revenue per car-mile on grain and its products. The combined tonnage of these 16 commodities is approximately the same as the aggregate tonnage of grain and grain products. Lumber and other forest products together form one of the commodity groups that yields lower car-mile revenue than grain and grain products. The average haul on products of forests in 1923 was 237 miles, as compared with the average of 267 miles on grain and its products; revenue per car-mile, 23.52 cents, as compared with 29.76 cents on grain and grain products, 20.06 cents on hay, and 28.46 cents on all carload traffic. The revenue per car-mile on grain, grain products, and hay was 2.61 cents greater than on all products of agriculture, 4.59 cents greater than on animals and products, 4.86 cents greater than on products of forests, and only 3.08 cents less than on manufactures and miscellaneous commodities. The car-mile revenues on wheat and corn alone on these 10 roads were, respectively, 42.63 and 37.18 cents, as compared with 28.46 cents on all carload traffic and 37.7 cents on products of mines with an average haul of only 127.2 miles. During this same period hay yielded an average of 16.1 mills per ton-mile, as compared with an average on all carload traffic of 10.94 mills and on manufactures and miscellaneous commodities of 13.09 mills. On 22 western roads in the first half of 1923 grain and its products furnished 12.7 per cent of the tonnage and yielded 12.8 per cent of the total carload revenues.

In comparing the transportation of grain with other commodities the utilization of car space is important. The ratio of the average loading of grain on six selected western roads in 1921 to the average capacity of box cars was 91.05, as compared with 57.2 on all traffic handled by all Class I carriers in the western district. To indicate

the increased utilization of car space these ratios may also be compared with the corresponding ratios for 1913 of 87.4 on grain and 54.4 on all traffic.

The rates on wheat, its products, and coarse grains in the western district are now generally 45 per cent and on hay 47 per cent above the rates in effect before the World War. On the other hand, the weighted-average farm price per bushel of wheat for the first 11 months of 1923 was only 25 per cent above that for 1913, oats only 13 per cent, and corn 36.5 per cent. The operating costs of the farmer since the war mounted just as much higher, and are just as much higher now, as those of the carriers.

The argument is advanced by the carriers that the effect upon the average farmer of a 15 per cent reduction in rates would be small compared with the aggregate effect upon carriers' revenues. But the same argument was advanced and rejected when we considered the general reductions of 1922. The effect upon the average farmer might be small, but so would the effect upon the individual railroad, and the aggregate effect upon the railroads would not be greater than upon the farmers as a whole. If the rates on a particular commodity are unreasonable, they should be reduced regardless of the effect of such a reduction upon the carriers' revenues.

A rate reduction, regardless of what percentage, will not by itself free the farmers from the economic struggle through which they are now passing; neither will a reduction in taxes, interest rates, or in labor or production costs, all of which have contributed to the farmers' difficulties. But that furnishes no reason for neglecting any one of these contributing factors. This record establishes, to my mind, that the rates on grain, its products, and hay are bearing more than their share of the transportation burden and are unreasonable. I think they should be reduced so as to relieve the complaining shippers of the full amount of the 1920 increases.

It is estimated that in order to remove all of the 1920 increases on grain, grain products, and hay in the western district, and continue the differential of 10 per cent between wheat and coarse grains, a reduction in aggregate revenue of approximately $27,000,000 would be necessary. An increase of less than 2 per cent in the rates on other commodities would more than make up this reduction. I do not mean to infer that it is our duty before we can make a reduction such as is contemplated here to find some way of returning to the carriers the revenue lost by such a reduction through increases in rates on other commodities, but simply to point out how small an increase in the rates on other traffic would be necessary in order to make up the contemplated reduction. If this reduction were made

and later developments indicated to the carriers that they were entitled to additional revenue, it would be their duty to suggest a rate revision for our consideration upon an adequate record which would enable us to protect the interests of the general public. If the multitude of so-called depressed rates now maintained by the carriers which do not bear their fair share of the transportation burden were increased to a reasonable level and the uneconomic, inefficient, and wasteful transportation under such rates, particularly over unduly circuitous routes, were stopped, the resulting additional revenue to the carriers would equal many times the reduction contemplated in this dissent.

LEWIS, *Commissioner*, dissenting:

I do not concur in the majority report. The record reveals that in the new era of prices and values into which we have passed since the war, the freight rates on grain, and particularly on western wheat, have been thrown out of proper relationship with other rates. We recognized this three years ago when the new levels had hardly begun to be established, and when the carriers had hardly begun to see net earnings. We applied lower rates to grain and hay, but this readjustment was wiped out to a very great extent when, two years ago, we applied the 10 per cent reduction to all other traffic. The present record affords proof that the existing rates on grain and grain products, but not hay, are unreasonable in the western and eastern districts, and on this showing I favor the removal of the remainder of the *Ex parte 74* increases in the West, and a 10 per cent reduction in the East, the latter covering the principal movements from western producing points to the great eastern consuming regions and to the various ports for export.

We, however, have duties under section 15a as well as under section 1, and are faced by the fact that the carriers' net return has not been and is not now as great as is contemplated by law or is necessary for the maintenance of an adequate system of transportation. Therefore, what is called for in this instance is readjustment of rates rather than reduction of revenues. The reduction on grain, therefore, should be accompanied by increases of rates on other traffic to an extent to equal revenue loss occasioned by the reduction. The carriers should be told to file such compensating increases and be given assurance that they would be acted on with such promptness that their 1924 revenues would not be materially reduced, their credit affected, or the solvency of the weaker carriers menaced by reason of such readjustment. There is no reason to believe that the railroad executives would not favor a readjustment of grain rates, provided their revenues were protected. Accepting their declarations we have reason to expect quite the contrary. There is before us recognition of the "urgent need for extensive

adjustments of this character." It is in the report of the transportation conference called by the Chamber of Commerce of the United States. Both carriers and shippers there represented—the carriers, east and west, by some of their ablest executives—declared that—

> great economic changes incident to and resulting from the war have added to previous disparities, which render a readjustment of relative freight rates of great importance. * * * The public interest demands that this task should be discharged by existing agencies in pursuance of established methods, but that it should be prosecuted with the greatest possible dispatch.

There is also prevalent a general recognition of the fact that in the new world era in which we are living there must be such readjustments. The commission should not close its eyes to these realities. If there is any place where this readjustment should begin it is with grain rates, and particularly with western grain rates. It so happens, as developed by an analysis of this record, that there is no place where needed readjustments would so little affect general business conditions, except ultimately to improve them. Likewise it also happens that there is no place where proper readjustments would do more to meet a resentment born of a sense of injustice that is not only disturbing to business but a menace to transportation.

I can not escape the conviction as I read the majority report, and particularly that part which appears under the heading "The Economic Condition of Agriculture," that the issue has been confused—befogged—and that the decision goes off on a misanalysis. We are not called upon by the complaint, nor did we start out in the nation-wide investigation which we initiated, to survey the agricultural industry or the condition of the general farmer. What we have before us is a grain, grain products, and hay case. There is inserted in the majority report a summary of the relatively low purchasing power of grains in 1923. These and similar comparisons are swept aside, however, by analysis of the general agricultural situation. There are extended analyses of bank clearings, savings deposits, and even mail-order house business, all of which would bear critical analysis if they were pertinent. What seem to be irrelevant matters are brought in, such as the feeding of corn. Certain indexes used, although submitted by the complainants, afford what seems to be an unfair comparison between grain prices and general commodity prices.

The majority seems to me to emphasize the theory that the economic condition of the agricultural industry has been and is slowly but progressively improving, that the benefit which would accrue to the average farmer in case of a reduction in rates is small as compared with the aggregate disastrous affect on certain of re-

spondents and on their credit, and, finally, that there is serious doubt whether farmers would not in many instances lose from impaired railroad service more than they would gain from a reduction in rates. It is decided that grain and its products are not now contributing more than their fair share to the revenues of the western group of carriers. It is with this decision that I differ.

There is no formula for the fixing of reasonable rates. It calls for the exercise of informed judgment, guided by certain recognized standards and the application of ethical principles. I do not advocate the determination of this or other cases solely on the basis of bad economic conditions. The adoption of such a principle would lead to a demoralizing instability of rates. This theory, applied to its logical conclusion, would require that freight rates should go up and down with market quotations. I do not favor granting the prayer for a reduction of the rates on hay. The economic distress plea is there. But the hay rates as measured by transportation conditions, and in relation to rates on other traffic, are not unreasonable or unfair to the producer. To reduce them would solely be in response to an economic plea. It would be equivalent to using the railroads and their owners as agencies for relief, or even for charity.

The usual standards employed in the determination of just and reasonable rates are transportation conditions, cost of service, value of service, earnings, comparison with other rates, and what the traffic will bear. Judged by almost all these standards, I find that grain rates are high and should be adjusted downward. The earnings per car and per car-mile are higher than on the average of all carload traffic, or of all carload traffic, excluding grain and its products. They are greater than on several other important classes of traffic, notwithstanding that the average haul of grain is greater than of all combined traffic. This is contrary to the usual standard of making the rate per mile decrease as the length of haul increases. The loading of grain and grain products per car is greater than average loading; that is, car space is better utilized. These conclusions are based upon figures covering 47,191 miles of road in the West for the full year 1923, which, in my opinion, are the really reliable figures of record. The majority apparently places great stress upon their figures covering 1922 and the first half of 1923, which make a slightly less favorable showing for grain. A comparison of grain earnings with earnings on other traffic in the West in 1922 is manifestly unfair to grain, inasmuch as reduced rates on grain were in effect throughout the year, while the full increased rates of 1920 still applied on most other traffic during the first half of the year. The figures for the six months of 1923 are less reliable than those for the

full year. There generally are two big movements of grain. The first is from the farm to market and is upon relatively high local rates. It occurs for the major part in the last half of the year. The second movement is from the market to point of consumption, upon relatively low proportional rates, and largely comes in the first half of the year. Therefore grain earnings for the first six months of the year unduly reflect lower earnings per mile than in the last half; and as there is no such season of variation with respect to traffic in general, a relatively unfair showing for grain is obtained by using only the first half of the year.

In the case of grains, we find new and lower values and relationships stabilizing over a period approaching four years. For three and one-half years now the grain grower's dollar—his ability to buy and to pay—has been out of line with everybody else's dollar in purchasing power; even out of line with the general farmer's dollar. Its value has fluctuated, but the last assay of it offered by the record, that of November, 1923, showed that, as compared with 1913, the corn dollar would only purchase 80 per cent of what it would purchase in 1913 in the all-commodity field, the wheat dollar only 78 per cent, and the oats dollar only 84 per cent. Wheat, corn, and oats dollars only would buy 60 per cent of the cloths that they would purchase in 1913, only 70 per cent of house furnishings, and only 65 to 70 per cent of building materials and 70 to 77 per cent of fuel. If there was taken into consideration the depressed value of the grain dollar in 1913, later referred to in connection with wheat and the comparison were made on the basis of 1909–1913, the disparity would be greater. Dollars in the last analysis are only worth what they will buy. A bushel of grain does not purchase as much transportation as it did. These conditions affect the value of the service—the well-recognized principle of what the traffic will bear.

Whatever may be the state of the agricultural industry and the general farmer, the grain growers, and particularly the grain men of the West, have not shared relatively in the general prosperity that has prevailed in commerce, industry, transportation, or, generally speaking, in the agricultural industry. Clearly the situation of the grain and hay farmers, particularly those of the West, is bad. Forgetting entirely return upon the investment in farms and machinery, many of these farmers have barely broken even over this three-year period; many others have suffered net loss. Mortgages have grown alarmingly; foreclosures or abandonments have been frequent. The majority report lays great stress upon the need for prosperity of our carriers. With this I heartily agree, but general and carrier prosperity require prosperity among our country population.

A plotting of the line of general cost of living as indicated by the wholesale price index of all commodities reveals that it has clung to

the 150 per cent line (1913 being used as 100 per cent), the index figure for 1921 being 147 per cent; for 1922, 149 per cent; and for 1923, 154 per cent. On the other hand a plotting of the trend of grain prices confirms the general knowledge that they have settled at lower levels. This is particularly notable in the case of wheat. Its price is influenced to a greater extent than prices of other grains by world production and competition. The average farm price of wheat, 1900 to 1923, inclusive, is shown in the following table, in comparison with the general trend of wholesale prices.

Year	Average farm price per bushel, Dec. 1	Index with 1913 taken as 100 per cent	Wholesale price index of all commodities, 1913 as 100 per cent	Year	Average farm price per bushel, Dec. 1	Index with 1913 taken as 100 per cent	Wholesale price index of all commodities 1913 as 100 per cent
	Cents				*Cents*		
1900	62.0	78	81	1912	76.0	95	99
1901	62.6	78	79	1913	79.9	100	100
1902	63.0	79	84	1914	98.6	123	98
1903	69.5	87	86	1915	91.9	115	101
1904	92.4	116	86	1916	160.3	201	127
1905	74.6	93	86	1917	200.8	251	177
1906	66.2	83	89	1918	204.2	255	194
1907	86.5	108	94	1919	214.9	269	206
1908	92.2	115	90	1920	143.7	180	226
1909	98.4	123	97	1921	92.6	116	147
1910	88.3	111	101	1922	15.7	126	149
1911	87.4	109	93	1923	92.3	116	154

When the hearings closed on February 5, 1924, the all-commodities price index stood at approximately 151 per cent of 1913, wheat at 115 per cent, oats at 126 per cent, and corn at 123 per cent.

From these data it is apparent that wheat prices as well as wholesale prices generally have been stabilized since 1920, but the level for wheat which flattened out along the 120 per cent line is decidedly below that for all commodities. In this table the two sets of index numbers have been based on 1913 as 100 per cent, but this tends to minimize the difference between the two sets of figures, because for wheat the price on December 1, 1913, was in a valley. Instead of a difference between approximately 120 and 150 it would perhaps be fairer to represent the difference as that between 111 and 152 by taking the period 1909–13 as a base. Reference is made in the majority report to the violent day-to-day grain-market fluctuations as minimizing the importance of the price factor in rate making. The above table, however, shows that the prices of wheat have been more stable, both actually and in relation to other commodities, in the past three and one-half years than at any time since January 1, 1900.

The record shows that on the basis of what the traffic can bear grain can not and should not be required to bear the same part of the transportation burden that it did in pre-war days, and this particularly applies to western grain.

BEFORE THE

Interstate Commerce Commission

RATE STRUCTURE INVESTIGATION. GRAIN AND GRAIN PRODUCTS WITHIN THE WESTERN DISTRICT, AND FOR EXPORT.

Docket 17000.
Part 7.

PETITION BY RESPONDENTS IN THE WESTERN DISTRICT FOR REHEARING AND RECONSIDERATION.

WALTER MCFARLAND,
ELMER A. SMITH,
P. F. GAULT,
DOUGLAS F. SMITH,
H. H. LARIMORE,
J. N. DAVIS,
A. B. MASON,
R. J. HAGMAN,
M. L. COUNTRYMAN, JR.,
R. S. OUTLAW,
A. B. ENOCH,
Attorneys for Petitioners.

CHICAGO, ILLINOIS,
September 6, 1930.

INDEX.

Page

Petition 1

Argument 8

The Commission has failed to observe the provisions of Section 15A (2) in reducing the general rate level on grain and grain products..... 9

(A) Since August, 1920, and at the present time, the carriers in the Western District have not earned and are not now earning a fair return 10

(B) The effect of the order will be to further widen the spread of net income below a fair return..... 14

(C) When prescribing just and reasonable rates Section 15a (2) imposes an affirmative duty upon the Commission to provide for a fair return 19

(D) The failure of the Commission to comply with the affirmative duty imposed upon it by Section 15a (2) is apparently due to a misinterpretation of the provisions thereof.... 23

The Commission has placed the grain and grain products rates on a general level so low that, in order to provide what was thought to be proper relationships, proportional rates are required which by the report itself are shown to be wholly indefensible.. 35

There is no evidence of record to justify the low general level of the rates prescribed for grain and the Commission's arbitrary action in this connection is accentuated by the requirements that grain products shall move on the grain rates and that free transit shall be accorded..... 40

Table of Cases Cited.

Page

Ann Arbor R. R. Co. v. United States, 50 S. Ct. 444..... 26

Dayton-Goose Creek Ry. v. United States, 263 U. S. 456.. 23

Increased Rates, 1920, 58 I. C. C. 220.....12, 21, 29, 31

Kansas Public Utilities Commission v. A. T. & S. F. Ry. Co. 83 I. C. C. 105.....13, 14, 28

New England Division Case, 261 U. S. 184..... 23

New York v. United States, 257 U. S. 591..... 23

Nor. Pacific v. Dept. Public Works, 268 U. S. 39..... 34

Rates and Charges on Grain and Grain Products, 91 I. C. C. 105, 118.....12, 14, 27, 28

Rates To, From, and Between Points South of The Ohio River, 64 I. C. C. 306..... 38

Reduced Rates, 1922, 68 I. C. C. 676.....12, 13

Revenues in Western District, 113 I. C. C. 3..... 31

Wisconsin Railroad Commission v. C. B. & Q. R. R. Co. 257 U. S. 563.....21, 23

BEFORE THE

Interstate Commerce Commission

RATE STRUCTURE INVESTIGATION. GRAIN AND GRAIN PRODUCTS WITHIN THE WESTERN DISTRICT, AND FOR EXPORT.	Docket 17000. Part 7.

PETITION BY RESPONDENTS IN THE WESTERN DISTRICT FOR REHEARING AND RECONSIDERATION.

Now come the carriers in the western district whose names are signed below, respondents in the above-entitled cause, and, in their own behalf and in behalf of all carriers operating in the western district, respectfully petition the Commission to vacate and set aside the order entered herein on the first day of July, A. D. 1930, and to grant a rehearing and a reconsideration of the issues. In support thereof your petitioners state:

I.

The order requires rates that will substantially reduce the revenues of your petitioners in the face of a general rate level which at present is and for years past has been insufficient to provide for a fair return.

II.

In entering the order herein the Commission has failed to comply with the affirmative duty, imposed upon it by the provisions of Section 15a, to provide for a fair return.

III.

The order becomes operative at a time so long subsequent to the closing of the record that the present conditions with respect to carrier revenue are not reflected by the facts which were in evidence before the Commission.

IV.

The order requires rates on grain and grain products at a level substantially below that which was twice recently approved by the Commission and there is no finding with respect to changed conditions in justification of the repudiation of its former decisions.

V.

While the findings are said to be under the provisions of the Interstate Commerce Act the Commission appears to have been influenced to a great extent by the Hoch-Smith Resolution as previously construed by it.

427

VI.

The general level of the rates is made so low that the proportional rates for equalization purposes are shown by the report itself to be wholly indefensible.

VII.

The order requires the transportation of grain products at the reduced wheat rates while the record shows without dispute that grain products not only are of higher value but that their cost of transportation is considerably in excess of the cost of transporting wheat.

VIII.

Combinations of flat rates to the primary markets and proportional rates beyond, applicable to other than continuous shipments, necessarily are unreasonably low if the components thereof result from breaking on the market points a one-factor through rate alleged to have first been determined upon a reasonable basis.

IX.

The requirement that there shall be two free stops in transit, plus one inspection, on a general level of rates as low as required is without justification.

X.

The order is made without evidence to support it or upon evidence which does not support it.

XI.

The order deprives your petitioners of their property without due process of law and takes from your petitioners their private property for public use without just compensation, in violation of the Fifth Amendment of the Constitution of the United States.

WHEREFORE, your petitioners pray that the order entered herein on the first day of July, A. D. 1930, be vacated and set aside, that a rehearing and a reconsideration be granted, and that your petitioners be given an opportunity to submit evidence which will bring the record down to date and apprise the Commission of the present situation with respect to carrier revenue.

Respectfully submitted,

The Atchison, Topeka and Santa Fe Railway Company,
The Beaumont, Sour Lake & Western Railway Company,
Bingham and Garfield Railway Company,
The Chicago and Alton Railroad Company, William W. Wheelock and William G. Bierd, Receivers,
Chicago and North Western Railway Company,
Chicago, Burlington & Quincy Railroad Company,
Chicago Great Western Railroad Company,

Chicago, Milwaukee, St. Paul and Pacific Railroad Company,
The Chicago, Rock Island and Gulf Railway Company,
The Chicago, Rock Island and Pacific Railway Company,
Chicago, Saint Paul, Minneapolis and Omaha Railway Company,
The Colorado and Southern Railway Company,
The Denver and Rio Grande Western Railroad Company,
Denver & Salt Lake Railway Company,
Duluth, Missabe and Northern Railway Company,
The Duluth, South Shore and Atlantic Railway Company,
Duluth, Winnipeg and Pacific Railway,
Fort Smith and Western Railway Company,
Forth Worth and Denver City Railway Company,
Fort Worth & Rio Grande Railway Company,
Great Northern Railway Company,
Gulf, Colorado & Santa Fe Railway Company,
Green Bay & Western Railroad Company,
Illinois Central Railroad Company,
International-Great Northern Railroad Company,
The Kansas City Southern Railway Company,
Kansas, Oklahoma & Gulf Railway Company,
Lake Superior & Ishpeming Railroad Company,
Los Angeles & Salt Lake Railroad Company,
Louisiana & Arkansas Railway Company,
Louisiana, Arkansas & Texas Railway Company,
Midland Valley Railroad Company,
The Minneapolis and St. Louis Railroad Company, W. H. Bremner, Receiver,
Minneapolis, St. Paul & Sault Ste. Marie Railway Company,

Missouri & North Arkansas Railway Company,
Missouri-Kansas-Texas Railroad Company,
Missouri-Kansas-Texas Railroad Company of Texas,
Missouri Pacific Railroad Company,
Nevada Northern Railway Company,
Nevada-Oregon-Washington Railway Company,
New Orleans, Texas & Mexico Railway Company,
Northern Pacific Railway Company,
Northwestern Pacific Railroad Company,
Oregon Short Line Railroad Company,
Oregon-Washington Railroad & Navigation Company,
Panhandle & Santa Fe Railway Company,
Quincy, Omaha & Kansas City Railroad Company,
San Antonio, Uvalde & Gulf Railroad Company,
The St. Joseph and Grand Island Railway Company,
The St. Louis, Brownsville and Mexico Railway Company,
St. Louis-San Francisco Railway Company,
St. Louis, San Francisco & Texas Railway Company,
St. Louis-Southwestern Railway Company,
St. Louis-Southwestern Railway Company of Texas,
San Diego and Arizona Railway Company,
Southern Pacific Company,
Spokane International Railway Company,
Spokane, Portland and Seattle Railway Company,
Texarkana & Fort Smith Railway Company,
Texas and New Orleans Railroad Company,
The Texas & Pacific Railway Company,
The Texas Mexican Railway Company,
Toledo, Peoria & Western Railroad,
The Trinity & Brazos Valley Railway Company,
Union Pacific Railroad Company,
Utah Railway Company,

431

Wabash Railway Company,
The Western Pacific Railroad Company,
Wichita Falls & Southern Railroad Company,
The Wichita Valley Railway Company,
The Yazoo & Mississippi Valley Railroad Company,

By

WALTER MCFARLAND,

ELMER A. SMITH,

P. F. GAULT,

DOUGLAS F. SMITH,

H. H. LARIMORE,

J. N. DAVIS,

A. B. MASON,

R. J. HAGMAN,

M. L. COUNTRYMAN, JR.,

R. S. OUTLAW,

A. B. ENOCH,

Their Attorneys.

ARGUMENT.

The determination of proper relationships in the rates on grain and grain products from producing to consuming territories and as between the various markets and ports would have taken care of the real interest that each complainant had in this case, without any reduction in the general level of such rates. The record shows that the interest of the producer is best served by properly related rates and that a general reduction therein will not inure to his benefit. But few complainants sought a general reduction and the most emphatic of these was not sufficiently optimistic to anticipate such a blow to carrier revenue as the Commission delivered by the order entered herein.

This petition is filed on behalf of the western carriers, respondents herein. It presents principally the all-important question of the rate level imposed which results in such pronounced reductions in revenue and further widens the spread, existing at present and for each year since 1920, of net income below a fair return. Some of your petitioners will file separate petitions, supplementing what is stated here and dealing with questions which affect their particular situations or which are of special concern.

I.

THE COMMISSION HAS FAILED TO OBSERVE THE PROVISIONS OF SECTION 15A (2) IN REDUCING THE GENERAL RATE LEVEL ON GRAIN AND GRAIN PRODUCTS.

For convenient reference we quote below the provisions of Section 15a (2):

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

The questions of net income and fair return should have been of paramount importance in reaching a decision in this investigation. Grain and grain products constitute a substantial part of the tonnage of the carriers in the western district and any appreciable reduction in the rates on these commodities would have a substantial revenue effect. Moreover, the application of the provisions of

Section 15a (2) to a proper determination of the issues in a case of such wide scope as the present proceeding is expressly recognized. At page 627 of its report the Commission puts the question it is called upon to decide as follows:

> "whether, under present conditions, the rates on grain and grain products throughout the western district are reasonable and just and are properly related to each other and to the rates on other traffic."

And in answering this question the Commission says that there must be taken into account, among other things, the following:

> "whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by law, including section 15a of the interstate commerce act, which we construe to permit, but not to guarantee, the carriers to earn 5.75 per cent on the fair value of the property devoted to the transportation service."

(A) SINCE AUGUST, 1920, AND AT THE PRESENT TIME, THE CARRIERS IN THE WESTERN DISTRICT HAVE NOT EARNED AND ARE NOT NOW EARNING A FAIR RETURN.

Your petitioners respectfully represent that they have never received the fair return upon their railroad property to which they are by law entitled. The Commission apparently concludes and your petitioners submit the fact to be that their net income is and for some years has been considerably less than is required. At page 627 of the report the percentage rates of return for Class

I carriers in the western district for the calendar years 1921-1928 are set out. These rates of return, computed on the investment of the carriers, as shown by their books, including materials and supplies and cash as of the beginning of the year, are as follows:

CLASS I ROADS AND LARGE SWITCHING AND TERMINAL COMPANIES.

	Regions			
	North-western	Central Western	South-western	Western District
1921	1.42	4.45	3.17	3.12
1922	2.78	4.07	3.27	3.45
1923	3.45	4.50	3.65	3.96
1924	3.12	4.21	4.34	3.87
1925	3.60	4.41	4.37	4.13
1926	3.83	4.86	4.56	4.45
1927	3.40	4.28	3.98	3.92
1928	4.04	4.59	4.32	4.35

It will be observed that for five out of the eight years the return is shown to be less than 4 per cent and that for the other three years it is less than 4.5 per cent. Reference is made in the report at this point to the composite earnings of three carriers which it is stated in 1927 yielded 4.75 per cent on the Commission's valuation, without considering subsequent investment. It is in connection with these three carriers only that a rate base other than book investment is mentioned.

During the progress of the hearing your petitioners presented their property investment as the minimum fair value upon which a rate of return lawfully may be computed and referred to the fact that their investment accounts did not reflect the increased price levels and

increased costs, prior to and since the war, except as to units installed during the periods of such higher levels of prices and costs. The merit of property investment as a minimum fair value upon which to gauge the fair return was further emphasized by comparison with the approximate value for a rate base taken by the Commission in *Increased Rates,* 1920, 58 I. C. C. 220, 229. In that proceeding the Commission found that the value of the steam railway property of the carriers in the western group was, for the purposes of that case, to be taken as approximating $8,100,000,000. The decision was handed down July 29, 1920. The Commission reviewed this finding of approximate value in *Reduced Rates,* 1922, 68 I. C. C. 676, 685, decided May 16, 1922. With respect to the value found in the earlier proceeding the Commission said:

> "We find no present reason to disturb the value taken by us in that proceeding as approximating the sums there stated, except to the extent that subsequent additions to or withdrawals from the property in service, including materials and supplies and working capital, and further depreciation, make adjustment necessary."

In its decision of July 10, 1924, in *Rates and Charges on Grain and Grain Products,* 91 I. C. C. 105, 118, the Commission again discussed this question of approximate value of railroad property in the western district. It said:

> "We have reviewed the evidence submitted on the question of value, and nothing of record leads

us to conclude that the basis of approximate value in the western district adopted by us in 1920 and reviewed in 1922 should be changed."

The sum of $8,100,000,000, found by the Commission to be the aggregate value for rate-making purposes in 1920, was 91.8528 per cent of the carriers' property investment as of December 31, 1919. Wettling's Exhibit 1208, page 11, shows that, using 91.8528 per cent of the property investment as of December 31, 1919, plus additions and betterments to and including the year 1926, the rate of return in the western district on such a basis for that year was 4.66 per cent. As shown in the table earlier in this section, the rate of return on property investment for 1926 was 4.45 per cent. On the basis of 91.8528 per cent of the property investment as of December 31, 1919, plus additions and betterments for the period ending with 1927, the rate of return for 1927 was 4.07 per cent as compared with 3.92 per cent as shown in the foregoing table.

The record does not supply any facts which would have justified the Commission in reaching any other conclusion than that apparently here reached that the general rate level had not provided and was not providing a fair return.

Prior to this case the Commission had unequivocally stated that which here appears to be its conclusion. *Reduced Rates*, 1922, *supra*, page 680; *Kansas Public Utilities Commission* v. *A. T. & S. F. Ry. Co.*, 83 I. C. C.

105, 114; *Rates and Charges on Grain and Grain Products, supra,* page 156, and Annual Report for 1926, page 4. In *Kansas Public Utilities Commission* v. *A. T. & S. F. Ry. Co., supra,* the Commission said:

> "In fact, as stated, carriers in the western group have been and are now earning considerably less than the prescribed return, and apparently less than the fair return to which they are entitled under their constitutional rights entirely independent of section 15a."

Upon the record the foregoing statement appropriately could have been incorporated in the report in this case. The conclusion is inevitable that the carriers in the western district have been and are being held to an inadequate rate level.

(B) THE EFFECT OF THE ORDER WILL BE TO FURTHER WIDEN THE SPREAD OF NET INCOME BELOW A FAIR RETURN.

The rates of return, as shown above, included the year 1928. The record before the Commission was closed in September of that year. The rates of return on the same basis and net railway operating income, for the full year 1929 and for the first six months period in 1929 and in 1930, are set out in the table next below:

CLASS I ROADS AND LARGE SWITCHING AND TERMINAL COMPANIES.

	Western District	
	Net Railway Operating Income	Rate of Return
Full year		
1929	$492,841,171	4.56
First 6 months		
1929	189,448,415	5.33
1930	113,760,610	3.12

The following table shows the net railway operating income by months for the first six months in 1929 and 1930:

	Western District Net Railway Operating Income	
	1929	1930
January	$ 25,443,765	$ 14,686,728
February	27,821,258	18,537,395
March	35,019,678	19,112,257
April	28,871,024	16,342,544
May	33,399,786	19,065,120
June	38,891,903	26,031,644
Total	$189,448,415	$113,760,610

Note: 6 months totals will not be a footing of the individual months as totals contain adjustments not made in monthly figures.

On the basis of 91.8528 per cent of the property investment as of December 31, 1919, plus additions and betterments, the rates of return upon investment as of the end of the year are as follows:

CLASS I ROADS NOT INCLUDING LARGE SWITCHING AND TERMINAL COMPANIES.

Full Year	Rate of Return
1928	4.56
1929	4.75
First 6 Months	
1930	2.74

There is indicated above a slight improvement for the full year 1929, but attention is called to the desperate sit-

uation now confronting your petitioners as shown by the rate of return of 2.74 per cent for the first six months of 1930 and by the income by months for the first half of the present year in comparison with similar data for the previous year. In fact, the true picture of the plight in which your petitioners now find themselves is even more desperate than is reflected by the foregoing tables, because the revenues during this year have been so inadequate as to require less than normal expenditures for maintenance. That thousands of employees that have been laid off is a matter of public knowledge and the monthly reports to the Commission show that for many of your petitioners the ratio of maintenance charges to operating expenses this year is below the ratio in preceding years. The situation is made the more desperate by the reductions herein imposed.

In 1921, for the calendar year ended December 31st, the Class I railways in the western district, excluding large switching and terminal companies, had a property investment of $9,269,822,458 and their net railway operating income for that year was $278,793,100. In 1929, for the calendar year ended December 31st, the Class I railways in the western district had a property investment of $10,976,493,979. Their net railway operating income for the first six months of the year 1930 was approximately $111,000,000. With $111,000,000 for the first six months, it is conservative to say that the rate of return for the full year 1930 in the western district will not exceed and will probably be less than for the

year 1921. Assuming, however, that it reaches that figure, the western district carriers will have earned no more in 1930 than they earned in 1921, their poorest year from 1921 to 1929, inclusive, although their property investment for the year ended December 31, 1929, exceeds their property investment for the year ended December 31, 1921, by more than $1,700,000,000. It will be observed in the foregoing illustration that we have compared the net railway operating income for 1921 and for 1930, but that the property investments shown are as of the end of the year 1921 and as of the end of the year 1929. Assuming $200,000,000 will be spent for additions and betterments in 1930, it is proper to say that the western district carriers will have earned no more in 1930 than they earned in 1921, their poorest year from 1921 to 1929, inclusive, although their property investment for the year ended December 31, 1930, will exceed their property investment for the year ended December 31, 1921, by more than $1,900,000,000.

Furthermore, the reductions in revenue from the order in this case come at a time when the effects of subsidized competition from water ways, trucks, etc., and the losses in passenger traffic, are felt to a greater extent than ever before. The distribution of automobiles by means other than rail transportation is increasing. Moreover, the carriers are facing the loss of a substantial tonnage because of the substitution of natural gas for coal, as fuel, and because of the use of the pipe lines for the

distribution of gasoline. This is no time for the downward revision of rates on a group of commodities that move in such substantial volume as do grain and grain products.

It is stated in the report by the Commission, at page 698, that the reductions far exceed the increases, and that the revenue effects of the order will be substantial. There is some assurance expressed that the readjustment will not threaten the maintenance of an adequate system of transportation, although a significant lack of confidence in the merit of the readjustment is manifest because it is stated that a failure of the present revision to afford adequate service will prompt further proceeding. In one of the separate opinions it is stated, at page 737, that the rates imposed are far too low and that they will involve a reduction of at least $15,000,000 in the revenues of the carriers in the western district, perhaps more. The loss, it is said, will fall most heavily upon carriers in the Southwest and in the Pacific Northwest which will derive no benefit whatever from the revision of the Western Trunk Line class rates. It is the belief of your petitioners that the revenue losses resulting from the present readjustment will exceed the figure above named and that the revenue losses will more nearly approximate $20,000,000.

Almost two years elapsed between the time the record was closed and the date of the decision. Even if the order could be said to have support, upon the record,

for application at the time the record was closed or shortly thereafter, that order becomes effective presently and during the intervening period conditions have so changed that a record containing evidence of present-day facts would further show the Commission's action to be wholly arbitrary and without any support. The Commission should be advised on the record of the present critical situation and your petitioners earnestly urge the Commission to set aside the order and grant a rehearing for the purpose, among other things, of affording your petitioners an opportunity to present the foregoing and other facts relating to the changed and present-day conditions which the Commission should have as evidence before assuming the responsibility of imposing a rate adjustment upon your petitioners that so substantially reduces their net income below the fair return to which they are entitled:

(C) WHEN PRESCRIBING JUST AND REASONABLE RATES SECTION 15A (2) IMPOSES AN AFFIRMATIVE DUTY UPON THE COMMISSION TO PROVIDE FOR A FAIR RETURN.

Section 15a, known as the "Rule of rate making," originated in Senate Bill No. 3288. It was intended to insure an adequate system of transportation for the nation by securing for investors a reasonable and fair return upon their investment. The Senate Report of November 10, 1919, page 13, said:

> "It is here that our present system of regulation has failed."

The Transportation Act, 1920, represented a new departure in railroad regulation. It introduced an entirely new theory of railroad regulation, namely, the assumption by the Federal Government of the obligation, not in the interest of the railroads or their owners but in the interest of the nation, to insure adequate transportation at all times. Congress could not very well do this directly, and direct action by Congress would not have been in harmony with the methods of regulation heretofore adopted. Accordingly this important duty was placed upon the Commission. The Commission was not only given the duty, but its powers to accomplish it were greatly enlarged. Its control was extended to the physical operation of the railroads in many respects, and matters which theretofore had been solely within the discretion of the managements of the carriers, subject to such state laws as might exist, became subject to the approval of the Commission. Without minutely describing the enlarged jurisdiction we may mention the power to control the construction or abandonment of railroads, the power to control consolidation and acquisition of railroads, the power to regulate more completely car distribution and train service, the power to control issuance of securities, and to fix minimum rates. In other words, the law contemplated that responsibility and power should go hand in hand. Regulation was no longer to be negative in character, but became affirmative.

As a part of this new scheme of regulation, Congress determined definitely that it was necessary for the carriers, under the conditions outlined in Section 15a, to receive a fair return upon their property devoted to the public service. To the Commission was entrusted the responsibility of carrying out this mandate of Congress.

There is nothing ambiguous about Section 15a with regard to the obligation laid upon the Commission to adjust rates so as to yield a fair return. This was recognized by the Commission in its first decision where the subject was under consideration, *Increased Rates*, 1920, *supra*. The Commission recited in that decision that the applications for increased rates were "made at our suggestion to assist us in complying with the provisions of that Section." The Commission discussed its duties and powers and said, at page 226:

> "Having determined the per cent, we are called upon to perform the administrative task of establishing rates that will yield in the aggregate as nearly as may be that per cent until March 1, 1922."*

This was the current interpretation of the law when the question first was considered by the Supreme Court in *Wisconsin Railroad Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563. With regard to Section 15a the Court said, page 584:

> "The latter, the most novel and most important

* The reference to March 1, 1922, as will be seen by an examination of Section 15a, does not limit the Commission's continuing duty and has no bearing upon the present situation.

feature of the Act, *requires the Commission so to prescribe rates* as to enable the carriers as a whole, or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation." (Italics ours.)

After discussing other features of the Transportation Act the Court said, page 585:

> "It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. *The new measure imposed an affimative duty on the Interstate Commerce Commission to fix rates and to take* other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in §15a to be one of the purposes of the bill." (Italics ours.)

The provisions of Section 15a (2) are more than a bare recognition of the right of the carriers to earn a fair return. They impose upon the Commission the affirmative duty to preserve and to protect that right, for that is the means, specified by Congress, of securing the maintenance of adequate service.

The Supreme Court has had occasion in other cases* to consider the changes made by the Transportation Act and has consistently held, as in the Wisconsin case, that Section 15a (2) imposed an affirmative duty upon the Commission to provide a fair return in order to secure the maintenance of an adequate transportation system.

(D) THE FAILURE OF THE COMMISSION TO COMPLY WITH THE AFFIRMATIVE DUTY IMPOSED UPON IT BY SECTION 15A (2) IS APPARENTLY DUE TO A MISINTERPRETATION OF THE PROVISIONS THEREOF.

The Commission discusses the financial condition of the carriers in the western district on pages 627 and 628 of its report. The discussion is very short, and your petitioners regret that more space was not devoted to this subject which is, they submit, the vital point for consideration when determining rate levels as in the present case. In other words, whatever might have been done with regard to a new scheme of rates, or in relationships between communities or between different kinds of grain, the level of the rates should have been

* For example, in *New York v. United States*, 257 U. S. 591, the Court referred to "* * * the income for which the Interstate Commerce Commission must attempt to provide by fixing rates under Section 15a of the Interstate Commerce Act * * * in carrying out the declared congressional purpose 'to provide the people of the United States with adequate transportation.'" Again, in *New England Divisions Case*, 261 U. S. 184, 189, 190, the Court stated that the Transportation Act introduced a new railroad policy, imposing new rights and obligations. It stated that "prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission, new powers were conferred and new duties were imposed." To the same effect is *Dayton-Goose Creek Ry. v. United States*, 263 U. S. 456, 478, where the Court states that the act seeks affirmatively to build up a system of railways, that the act places the railroad systems more completely under the "fostering guardianship and control of the Commission," and that, by fixing adequate rates for interstate commerce, it seeks "to secure a fair return upon the properties of the carriers engaged."

448

fixed with regard to the financial needs of the carriers and the requirements of Section 15a. The discussion in the report shows, however, as indicated herein, that the carriers in the western district have at no time since the Transportation Act was passed received a fair return upon their investment. This is further emphasized by the discussion of the "unfavorable financial showing of the coarse-grain carriers, especially in western-trunk-line-territory," pages 651 and 642. As we understand, there is no real dispute concerning the fact that your petitioners have never received the fair return upon their property devoted to the public service to which they are entitled under the law. Yet in spite of a net income that has been considerably less than a fair return for a good many years, and of greater significance, in the face of the present grossly inadequate revenues, the Commission proposes to further substantially reduce the carriers return by its order in this case. Such action is apparently due to a misinterpretation of the provisions of Section 15a (2).

After stating that the reductions far exceed the increases and that the corresponding revenue effects will be substantial, page 698, but without reference to the existing shortage in income or the inadequacy of the earnings in previous years, the Commission appears to feel its action is nevertheless justified because it says it is satisfied "that the readjustment will not threaten the maintenance of an adequate system of transportation." This is a misconception of the Commission's obligation.

Congress declared its purpose in passing the Transportation Act. That purpose was to secure the maintenance of an adequate transportation service. But Congress also specifically prescribed the means by which this object is to be attained. There can be no mistake on this point. The Supreme Court has held in the cases heretofore mentioned that there is expressly imposed upon the Commission by Section 15a (2) the affirmative duty to provide for a fair return. By this means to an end, Congress has declared the Commission shall proceed. It is not for the Commission to say that while Congress has prescribed the means to secure adequate service, the Commission may disregard that injunction if it believes it can accomplish the same result by pursuing a different policy. In this respect the Commission is given no discretion to substitute its judgment for that of Congress.

The Transportation Act established the fair return as an inseparable accompaniment to the maintenance of an adequate system of transportation. Apparently the Commission has sought to separate the two, thus substituting an uncertain and fluctuating standard of what is necessary to insure adequate service. It is respectfully submitted that this goes beyond the power of the Commission.

The Commission states, as indicated above, that the precise effect upon revenues cannot be determined without a test and suggests that a trial of the new rates be

made indicating that, if the result proves disastrous, application may be made for relief from the requirements of the order. The investigation of which this proceeding is a part was instituted pursuant to the so-called Hoch-Smith Resolution. In its notices of hearing the Commission recited that the issues in this proceeding arose under the Hoch-Smith Resolution as well as under the Interstate Commerce Act. Much evidence was introduced bearing upon the alleged depression in agriculture. The Commission finds, at page 627, that while conditions affecting the grain farmer had been improving within the few years immediately preceding the hearing there is still depression in the grain industry. Just shorty before this case was decided, however, the United States Supreme Court handed down its decision in the California Fruit case, *Ann Arbor R. R. Co.* v. *United States*, 50 S. Ct. 444, decided June 2, 1930. That decision overturned the Commission's interpretation of the Hoch-Smith Resolution and held among other things that existing rates which were not unreasonable or unlawful under the Interstate Commerce Act were not to be condemned because of the Hoch-Smith Resolution and particularly the third paragraph thereof. The Commission accordingly, on page 661 of its present report, states that the findings in this case are under the provisions of the Interstate Commerce Act. It seems apparent, however, that its decision has been influenced to a great extent by the terms of the Hoch-Smith Resolution, as previously construed by it.

Just prior to the institution of this investigation and to the enactment of the Hoch-Smith Resolution the Commission, upon a record bulging with all of the pertinent facts pertaining to the subject and containing an exhaustive survey of the economic condition of the industry, approved the existing level of rates on grain and grain products in the western district. See *Rates and Charges on Grain and Grain Products,* 91 I. C. C. 105, decided July 10, 1924. This case, according to the Commission's report, was instituted to determine to what extent, if any, the rates, charges, regulations and practices of the carriers subject to the Interstate Commerce Act, in respect of the transportation of grain, grain products, and hay in interstate or foreign commerce, were or for the future would be unjust, unreasonable or otherwise unlawful. The evidence was voluminous and covered every phase of the subject. With respect to the rates in the western group the Commission said, at page 163:

> "(a) That rates on grain, grain products, and hay, generally speaking, are now on a somewhat lower basis compared with pre-war freight rates than are the carload rates on other traffic."
>
> "(b) That the earnings per car, per car-mile, and per ton-mile on grain and grain products, compared with other classes of traffic and with all carload traffic, do not show that grain and its products are now contributing more than their fair share to the revenues of the carriers in this group, considering the value of the traffic, the average hauls, the

relative services performed, and the ratio of revenue produced by grain and grain products to total carload revenue compared with former years."

"(c) That the present adjustment of rates on grain and its products from the 'element of value' standpoint, compared with the other heavy-loading commodities moving in volume, pointed to by complainants, as profiting by the disturbance in relative values, is not unfavorable to grain and grain products."

The Commission further said, at page 164:

"All we here decide is that under the facts and conditions shown by this record and viewing the present structure as a whole, the existing rates on grain, grain products, and hay are not unreasonable *when the usual tests are applied.*" (Italics ours.)

The following general finding was entered, page 165:

"Upon all the facts of record we find that the general basis of rates, charges, regulations, and practices of carriers subject to the interstate commerce act for the transportation of grain, grain products, and hay in interstate or foreign commerce, brought in issue in these proceedings, are not unreasonable or otherwise unlawful."

One year prior to its decision of July 10, 1924, in *Rates and Charges on Grain and Grain Products, supra,* the Commission also had approved of the level of these rates in *Public Utilities Commission of Kansas* v. *A. T. & S. F. Ry. Co., et al.,* 83 I. C. C. 105. According to the report therein, handed down October 11, 1923, the issues related to the reasonableness and propriety of the level

of interstate rates for the transportation of grain, grain products, and hay, between points in the western group as defined in *Increased Rates*, 1920, *supra*. At page 115 of its decision in this latter case the Commission said:

> "If the usual tests of the reasonableness of rates, approved by experience and valid in law, show the basis as to any commodity to be too high it would be our duty under section 1 of the act to find such rates to be unreasonable. Many of the rates here assailed have been prescribed by us; others are depressed by competition of various kinds. So far as the usual tests of the reasonableness of rates shown by the record, other than perhaps the values of the commodities when viewed from the standpoint of existing prices, may be applied to the question before us, they do not indicate that the general basis of rates on the commodities here in issue is unreasonably high."

In the report under consideration there is no explanation for the failure to apply the usual tests of reasonableness of rates, approved by experience and valid in law, to the determination of the present issues, nor does the report offer any explanation for such a severe condemnation of a rate structure which, as above stated, twice had received the Commission's approval shortly preceding the order instituting this investigation.

The influence of the Hoch-Smith Resolution may also be reflected in some of the separate expressions filed with the main report. Thus in an opinion, concurring in part, it is said, page 718:

> "Level of the rates—Throughout this proceeding

> the Hoch-Smith resolution has been emphasized. In a situation like that which is here presented, that resolution makes it our duty to prescribe the 'lowest possible lawful rates compatible with the maintenance of adequate transportation service.'"

Reference frequently is made in this opinion to the "lowest possible lawful rates" and to rates "compatible with the maintenance of adequate transportation service." The same idea, it may be said in passing, seems to underlie the thought in the main report at page 698, where, after commenting among other things upon the substantial revenue effects of the revision, it is said in justification of the readjustment that it will not threaten "the maintenance of an adequate system of transportation."

The following appears in another opinion, concurring in part, at page 742:

> "This proceeding is an outgrowth of the Hoch-Smith resolution, and surely Congress when it passed that resolution admonishing the commission to afford all possible relief to the farmer meant the coarse-grain farmer just as much as it meant the wheat farmer."

In a separate concurring opinion of the Commissioner who had charge of the case, it is said, page 700:

> "The rates prescribed lie within the zone of reasonableness, but they are the lowest rates on this traffic which can be lawfully prescribed."

Again, page 703, the same Commissioner states:

> "Whatever the facts may be in this regard, we are

establishing herein rates as low as we can lawfully prescribe."

Another concurring opinion indicates, page 736, "that the level herein prescribed is probably too low to be permanent." Still another opinion, concurring in part, states, page 737:

> "My main difficulty with the report is the level of the rates prescribed. They are, in my judgment, far too low. They will involve a reduction of at least $15,000,000 in the revenues of carriers in the western district—perhaps more—and that loss will fall most heavily upon carriers in the Southwest and in the Pacific Northwest which will derive no benefit whatever from our revision of western trunk-line class rates."

Your petitioners have attempted to point out what, as they believe, is the inherent fallacy in the interpretation of the law which the Commission apparently continues to entertain. Congress, in Section 15a, laid an affirmative duty upon the Commission to adjust rates in such a manner that the carriers would secure a fair return. This was not done primarily for the carriers, although they are participants in the benefits from the plan, but for the protection of the public against a failure of the transportation system to function properly at all times. The Commission in *Increased Rates*, 1920, *supra*, recognized and accepted this important duty, and endeavored to fulfill it. Later in *Revenues in Western District*, 113 I. C. C. 3, 37, 38, the Commission, without expressly reversing

what is said in the earlier decision, apparently repudiated this obligation and indicated the view that its function was that of reviewing proposals brought before it by the carriers. The carriers did have before it at the time a proposal for an increase in rates, which took the form, in general, of a flat five per cent advance, but the Commission indicated it would not grant such an increase except in case of an emergency. In passing, it may be remarked that there is no provision in the Act indicating that the Commission's affirmative duty is limited to periods of emergency. The purpose of the act obviously is to avoid emergencies.

Since the Transportation Act was passed ten years have elapsed, but the carriers in the western district have never received the fair return which the law contemplates. They seem to be at least as far from receiving it at the present time as they were in the most unfavorable year within the last ten-year period. The blow that would be dealt their revenues by the decision in the present case would accentuate their continued failure to obtain the income to which they are entitled. As we understand the situation, your petitioners differ with the Commission on two related points of law: (a) it is the position of your petitioners that, as expressly set forth in Section 15a, and as stated repeatedly by the Supreme Court, an affirmative duty rests upon the Commission when prescribing rates to take such steps as will result in your petitioners receiving a fair return upon the value of their railroad property devoted to the public service; and (b) it is further the position of your petitioners that in the face of earnings

457

constituting considerably less than a fair return, the general trend of rate adjustments must be upward rather than downward, and that the Commission cannot lawfully make reductions in rates upon a group of commodities moving in heavy volume which will result in enormous revenue losses.

In the view of your petitioners, these points of law are not overcome simply by the Commission's willingness to consider, when presented by the carriers, proposals for increases in rates on certain commodities, or by the fact that other portions of the Rate Structure Investigation are still pending. Experience during the last ten years has demonstrated that the general rate level of the western district is too low. The continuing requirement of the statute therefore binds the Commission to take steps which will increase revenues rather than reduce them. In the present case, on the contrary, the Commission has undertaken to revamp the rate structure on grain and grain products and, in so doing, to fix the rate level for these commodities on what would be a substantially lower basis than at present so as to result in drastic reductions in revenues which are already below the level the Commission is directed by law to maintain.

Your petitioners further invite the attention of the Commission to the fact that the effectiveness of Section 15a is not altered or lessened by indicating that the new rates are to be imposed for a test period, after which resort may be had to the Commission for relief therefrom. The outstanding facts are that the carriers in the western district have never received the fair return;

that at the present time their income is at least as unfavorable as it was for the poorest year since 1920; and that, without any test period, the substantial reductions required will further accentuate the existing unfavorable revenue results from operation. The case of *Nor. Pacific* v. *Dept. Public Works*, 268 U. S. 39, presented a somewhat similar situation. There an attempt was made to defend an order of a State Commission prescribing rates, assailed as unsupported by evidence and as confiscatory, on the ground that the order was made, in terms, for an experimental period. At page 45 the Court said:

> "The invalidity was not avoided by making the order, in terms, for an experimental period. The rates as to which the evidence was primarily directed were those in force before and during the hearings. If even the existing rates were confiscatory, as the carriers' evidence embodying the results of ample experience tended to show, there could be no reason for awaiting the test of the much lower rates which were prescribed."

So here the present rates of the western carriers are not providing for a fair return and it is clear that the order of the Commission in this case will further reduce their income. There is no occasion for any test to determine the precise degree in which your petitioners are to be prevented from securing a fair return and no such test period is necessary to disclose the obvious fact that the substantial reductions required are contrary to the spirit and letter of Section 15a.

II.

THE COMMISSION HAS PLACED THE GRAIN AND GRAIN PRODUCTS RATES ON A GENERAL LEVEL SO LOW THAT, IN ORDER TO PROVIDE WHAT WAS THOUGHT TO BE PROPER RELATIONSHIPS, PROPORTIONAL RATES ARE REQUIRED WHICH BY THE REPORT ITSELF ARE SHOWN TO BE WHOLLY INDEFENSIBLE.

There are shown below certain of the proportional rates required by the order, together with short-line distances and rates for such distances on the western trunk-line scale which is prescribed, as set out in Appendix D:

	Air-Line Distance*	Prop. Rate	W.T.L. Scale
To Minneapolis from Sioux City	258.9	8.5	18.5
To Duluth from Minneapolis	149.5	4.5	14.5
To Omaha from Sioux City	99.9	3	12
To Kansas City from Omaha	182.2	6	15.5
To St. Louis from Kansas City	272.8	9	19.5
To New Orleans from Memphis	394	10	23.5
St. Louis	689	19	33
To Chicago from Omaha	475.4	15	26
Minneapolis	400.3	11	23.5
To Little Rock from St. Louis	343	10	21.5
To Texas Group 3 from Kansas City	737	21	34.5
St. Louis	826	23	37.5

* Distance over route via which carload traffic can be interchanged without transfer of lading.

Other proportional rates are prescribed, but the foregoing forcefully demonstrates the point made in this section of the petition. There is no justification for the low general level of rates reflected by the interior scales which the Commission has adopted in this proceeding and no explanation for such a level, considerably below that heretofore approved, is attempted in the report. Nevertheless, the lowest interior scale alone condemns the proportional rate structure.

It is no defense to the level of the foregoing rates o say they are proportionals, as distinguished from other types of rates. As proportional rates they are required to be published as separately established rates. The Commission has prescribed the proportional rates for application to shipments which are in storage and which require an originating service similar in all respects to that which would be furnished if such shipments had never previously had rail transportation. Furthermore, the proportional rates are applicable whether or not the outbound carrier participates in the movement inbound. The rails of many of the carriers do not extend beyond the market points.

The proportional rates are made applicable to the transportation of flour and other products, and aside from inspection if a shipment has had but one transit service it may have another such service under the proportional rates before final delivery. The Commission is advised on this record of the

utter dependence of the Southern Minnesota millers upon the proportional rate from Minneapolis to Chicago. These millers buy millions of bushels of wheat every year out of Minneapolis storage. The present proportional rate of 13 cents from Minneapolis to Chicago provides for transit at interior mill points. This 13-cent rate has heretofore been characterized by the Commission as one of the lowest rates in the country. The order herein reduces it from 13 cents to 11 cents. The southern Minnesota millers will purchase Minneapolis storage wheat, move it out of storage to interior mill points, manufacture flour, ship the flour on to Chicago and for all of this transportation over an airline distance of 400 miles, including at least four terminal services, the carriers, under the order, will earn approximately $70 per car. For the service in transporting flour and other products direct from Minneapolis to Chicago the earnings will be $55 per car on the basis of a 50,000 pound load. Of course the distances over which direct shipments from Minneapolis to Chicago move are in excess of 400 miles. And when transited shipments are considered the distances are even greater because many of the intermediate mills are not in direct line.

The rate required from Sioux City to Omaha is 3 cents for a distance of 100 miles. On a shipment of coarse grain weighing 70,000 pounds the carriers will receive the sum of $21 for the service between these points. This sum is less than the cost of originating and ter-

minating the shipment, aside from the road-haul of 100 miles, as shown by the analysis of cost of service submitted by the Director of the Commission's Bureau of Statistics, Exhibit 1063. Approximately $25 was shown to be the cost of two terminals, depending upon the weight of the lading, and this did not include any portion of the taxes, equipment and joint facility rents, or any return on investment. Under this rate of 3 cents the carriers will earn $12 for the service of transporting 40,000 pounds of grain products from Sioux City to Omaha. The western trunk line scale if applied between Sioux City and Omaha would provide a rate of 12 cents.

The proportional rates from St. Louis and Memphis to New Orleans will become 19 cents and 10 cents, respectively. In *Rates To, From, And Between Points South Of The Ohio River*, 64 I. C. C. 306, 340, the Commission found that the domestic proportional rates on grain and grain products from St. Louis to Memphis and New Orleans should not be increased to exceed 12.5 cents to Memphis and 31½ cents to New Orleans, and that in all other instances where reshipping rates were in effect they should be revised in harmony with the rates prescribed from St. Louis to Memphis and New Orleans, distance considered. Subsequent to this decision the Commission said repeatedly in other cases that the 31.5-cent from St. Louis to New Orleans was not named by it as a maximum reasonable rate. The western trunk line scale

would provide a rate of 33 cents from St. Louis to New Orleans and of 23 cents from Memphis to New Orleans. The 10-cent rate from Memphis to New Orleans will control the grain and grain products adjustment into the valley and southeast. This subject will be dealt with in separate petitions.

In our brief we called attention to the admitted imperfections in the analysis of cost of service study, above referred to, and to its other inherent fallacies, and showed that the unit costs derived were too low. That analysis, however, demonstrates the confiscatory character of the proportional rate structure. For example, on page seven of the study, the average load of flour and meal in the western district for the year 1925 is shown to be 25.46 tons and the unit operating expenses per cwt. derived for the transportation of flour and meal are 4.55 cents per terminal and 0.02267 cents line haul per mile. On this basis the cost of transporting such commodities from Kansas City to Chicago over the short single-line distance of 451 miles is $75.22. Under the prescribed rate of 15 cents from Kansas City to Chicago the carriers will earn $76.38. Data from the same source shows that it costs $62.60 to transport a car of corn from Sioux City to Minneapolis, using a distance of 260 miles, which is less than the distance over the shortest route that moves traffic between these points. Under the 8.5-cent rate from Sioux City to Minneapolis the carriers will earn $64.17 on a car of corn weighing 37.75 tons. Similarly

the cost of transporting a car of oats between these points is shown to be $59.46 on the basis of 33.73 ton car. Under the 8.5 rate the carriers will earn $57.34.

Tests of the other rates will produce similar results. Sufficient has been said, however, to demonstrate the ridiculously low level of the proportional rates and if accurate cost units were applied they would show that the general level of rates reflected by the required scales is below the line of confiscation.

III.

THERE IS NO EVIDENCE OF RECORD TO JUSTIFY THE LOW GENERAL LEVEL OF THE RATES PRESCRIBED FOR GRAIN AND THE COMMISSION'S ARBITRARY ACTION IN THIS CONNECTION IS ACCENTUATED BY THE REQUIREMENTS THAT GRAIN PRODUCTS SHALL MOVE ON THE GRAIN RATES AND THAT FREE TRANSIT SHALL BE ACCORDED.

The report does not explain or support with good reason the Commission's action in so substantially reducing the general grain rate level below that recently twice approved. Nor was any weight given, apparently, to the special costs, in addition to the ordinary transportation cost, that are incident to the handling of this traffic, such as are occasioned by the materially greater empty car movement than in the case of box-car traffic in general, peak movement, the storage of cars in or near the grain fields for the purpose of taking care of the peak movement, the furnishing of cooperage material,

grain doors and tight equipment, the higher percentage of branch line movement, the extra service at terminals, and other such special costs shown by the record. Upon this low rate level the Commission imposes the requirement that grain products are to move on these same rates and the requirement that under such rates the carriers shall accord the privilege of two free stops for transit and one for inspection. As stated in one of the separate opinions, concurring in part, at page 710, the record shows without dispute that it costs considerably more, probably in the neighborhood of 25 per cent, to transport grain products than wheat, and in general the grain products are also of materially higher value. The record also shows that it costs approximately $25 to perform two terminal services, such as are performed at the time grain is stored at intermediate points and later seeks transportation as grain or such as are performed when grain is manufactured into flour and other products at intermediate points and again seeks further transportation in the form of products.

The value of transit services and the cost of performing such services are also ignored in connection with the rates prescribed to and from markets. With respect to the primary market combinations the Commission says, at page 661, that the rates prescribed were first determined upon a reasonable basis and were then broken back into flat rates to the primary markets and proportional rates beyond.

Even if the through rates were on a reasonable basis, which we deny, the resulting combinations are necessarily unreasonably low. And a large volume of tonnage, which is temporarily interrupted at market points, engages these combinations. With respect to the Missouri River markets, for instance, the amount of wheat from west of the Missouri River in eastbound movement that is not stopped at the Missouri River markets for storage or manufacture on its way to the east, is relatively small. The same situation exists at Minneapolis.

The usual tests of the reasonableness of rates and the customary rate-making standards not only show that the general level adopted for the grain rates finds no support upon the record but they emphasize the arbitrary character of the requirements aforementioned.

The carriers in the western district are not now earning and for years past have not earned the fair return provided by law. The order complained of will further substantially reduce their net income. The low rate level thus imposed manifests the Commission's failure to fulfill the affirmative duty placed upon it by the provisions of Section 15a (2) and further manifests its failure to employ the usual tests of the reasonableness of rates applied by the Commission when it but recently found in two decisions that the existing general level of rates on grain and grain products was not unreasonable. For the reasons set out in the petition and in the

argument in support thereof we earnestly request the Commission to vacate and set aside the order entered herein on the 1st day of July, A. D. 1930, and to grant a rehearing and a reconsideration of the issues presented upon the record.

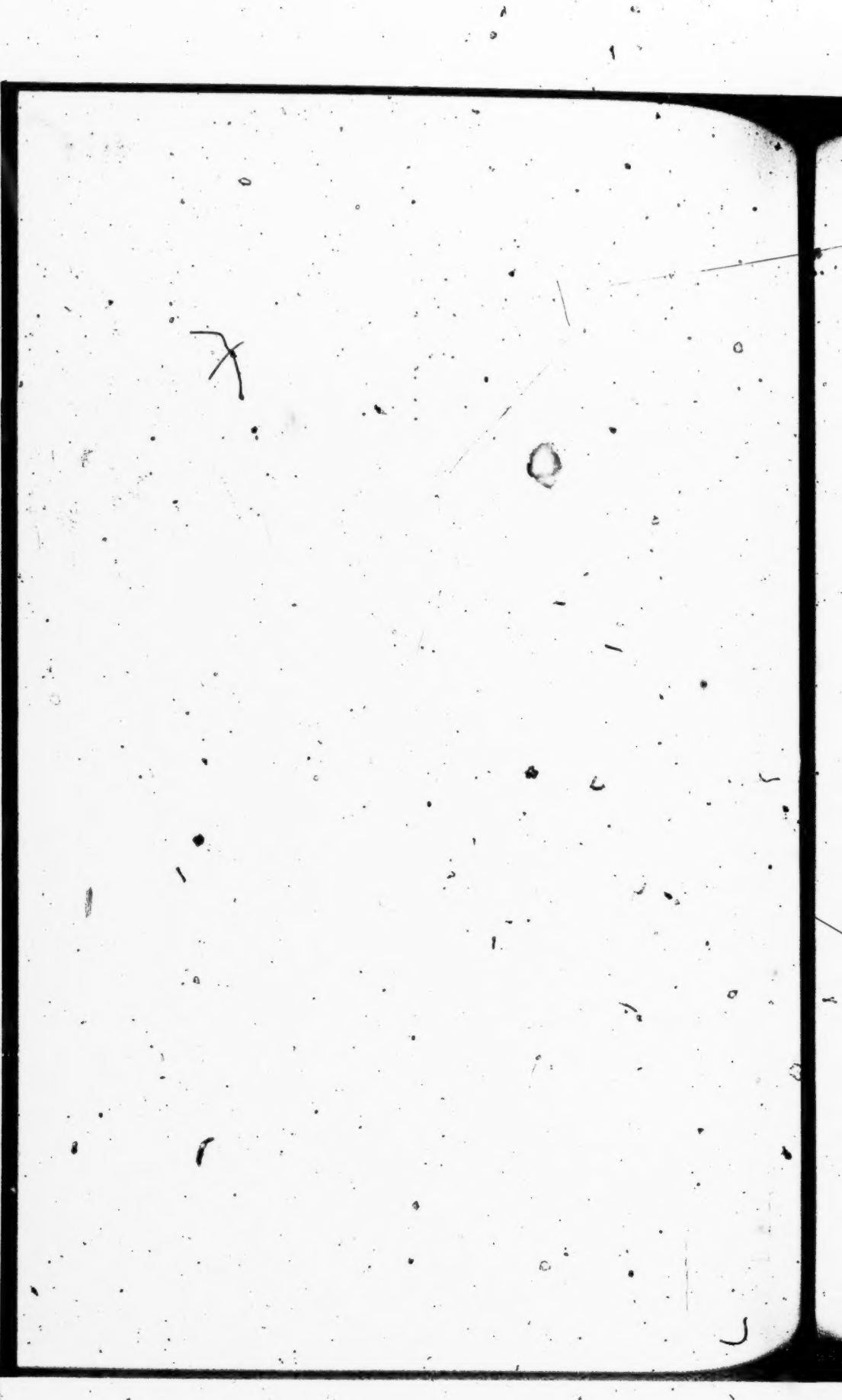
Respectfully submitted,

WALTER MCFARLAND,
ELMER A. SMITH,
P. F. GAULT,
H. H. LARIMORE,
J. N. DAVIS,
A. B. MASON,
R. J. HAGMAN,
M. L. COUNTRYMAN, JR.,
R. S. OUTLAW;
A. B. ENOCH,
Their Attorneys.

Room 1025, La Salle Street Station,
Chicago, Illinois,

TATEMENT SUBMITTED TO THE INTERSTATE COMMERCE COMMISSION BY THE WESTERN ASSOCIATION OF RAILWAY EXECUTIVES.

ovember 6, 1930.



To The Interstate Commerce Commission:

This statement is submitted on behalf of the Association of Western Railway Executives. Believing that the situation of the western railroads has become sufficiently serious to menace the maintenance of adequate transportation for the future, we conceive it to be our duty to the public and to the properties in our charge to report these facts. Under the Interstate Commerce Act, as amended by the Transportation Act, 1920, the ultimate obligation in respect to the maintenance of an adequate system of transportation by railroad is placed upon the Interstate Commerce Commission, the effect of which has been described by the Supreme Court of the United States as putting "the railroad systems of the country more fully than ever under the fostering guardianship and control of the Commission."* Many of the facts herein presented appear in statistical reports filed either pursuant to law or regulations of the Commission or are matters of common knowledge. They have not, however, been brought together in the present form so that their combined effect may be fully appreciated. It is not our purpose in presenting this statement to undertake to affect the decision of pending cases, but simply to bring these concrete facts to your attention that they may be given consideration in your administration of the duties which Congress has directed the Commission to discharge.

*Chief Justice Taft in Dayton-Goose Creek Ry. Co. vs. United States, 263 U. S. 456, 478.

In no year since 1920 have the railroads in the Western District received earnings which approximate a fair return upon the aggregate value of their properties. During this period there has been a continued reduction in the general level of freight rates, beginning with the year 1921 when drastic reductions were made in the rates on grain, grain products and hay and on livestock in our territory, and in the year 1922 when the freight rates on all other commodities were reduced 10 per cent, all pursuant to decisions of your honorable Commission. Since that time there have been numerous other decisions dealing with rates on particular commodities which have resulted in further loss of revenue. There have also, from time to time, been certain readjustments made by the railroads themselves, in the usual course of business, which have, to some extent, affected the general rate level. Some of these were made necessary by the indirect effect of decisions of the Commission readjusting other rates.

While it has on occasion been critically asserted that the railroads themselves have contributed to the downward trend of freight rate levels by voluntary reductions in rates, such reductions constitute a small part of the total rate reductions which have taken place since 1920. Such voluntary reductions as have been made have been the result either of managerial judgment as to rates which might be required for the movement of traffic in particular circumstances or they have been the natural result of competition between railroads, the competitive principle of railroad operation having been retained and safeguarded by Congress in the Transportation Act of 1920 as being in the public interest.

In the year 1925 the Western District carriers undertook, through appropriate proceedings before this Commission, to secure an increased freight rate level in their territory. Such increased freight rate level we believed necessary in order that we might more nearly approximate earnings which would be equivalent to the fair return upon the value of railroad property in the aggregate in our district, which fair return Congress has recognized as essential to the maintenance for the present and for the future of an adequate system of transportation. Even aside from this recognition, it is axiomatic that adequate earnings are essential to adequate transportation. Our petition for an increase in freight rates was denied in *Revenues in Western District,* decided July 14, 1926, 113 ICC 3, upon the ground that no financial emergency existed sufficient to warrant a horizontal increase in freight rates throughout the Western District.

Since that time we have continued our best efforts to reduce the cost of operation and have been successful in achieving substantial results. This we have done through close supervision, through improvements in methods, such as longer engine runs, fuel economies, reduction in loss and damage claims and a more intensive use of equipment, and through expenditures for improved facilities, including machinery and tools. Some of these results have been attained only through the helpful cooperation of the employes and the shippers. Substantial increases have been brought about in net ton miles per freight train mile and per locomotive mile, net ton miles per train hour, car miles per car day and miles per train hour, all of which have tended toward reduction in oper-

ating expenses. Service has been improved and delay resulting from car shortage eliminated. Among the benefits to the public which have resulted from the more expeditious and certain movement of freight has been the reduction in stock which jobbers and merchants are obliged to carry. Meanwhile, we have been required, through arbitration and mediation proceedings under the Railway Labor Act, to increase the wage scales of various classes of employes until today for many classes of employes these wage scales exceed those which were in effect during the Federal control and guaranty periods of 1920, which were the highest wages that had been paid up to that time.

During this period, the further development of the automobile bus in our territory, coupled with the increased use of privately-owned automobiles, has resulted in further drastic curtailment of passenger revenue. The automobile truck has likewise diverted an enormous amount of freight traffic from the railroads to the highways and its radius of operation is being constantly extended. These automobiles are using the public highways with little or no contribution to the cost of constructing and maintaining the same whereas in 1929 Class 1 carriers in the Western District expended for the maintenance of ways and structures the sum of $346,483,316.00 and in addition thereto owned the roadbeds on which they operated, which represented a large property value on which it is essential, under the present system of operation, that they should earn a fair return. The railroads also pay taxes upon this and other of their property, which taxes have been increasing in recent years due in no small

measure to public expenditures for highway construction. In other words, the railroads have been required to pay in part for the facilities used by competitive forms of transportation.

In addition to this, new construction of pipelines throughout large sections of the Western District for natural gas is already making important inroads upon the revenue from coal traffic of Western District carriers and gives promise in the future of seriously curtailing the movement of coal and other fuel throughout the territory. Likewise, there are under construction extensive systems of pipelines to transport gasoline which will further reduce both the tonnage and revenue of the railroads. This pipeline construction for natural gas and gasoline constitutes a most serious present and future menace to railroad revenues. Its adverse effect upon highly important revenue producing traffic is apparent for in 1929 Western District Class 1 railroads received $317,213,226.00 for the transportation of coal and petroleum and its products.

During the same period, there has been a further development of inland waterways and the operation of government barge lines which has resulted in a serious diversion of an increasingly large volume of freight traffic from the steam railroads to the waterways. This waterway competition, like the use of the public highways by the automobile bus and truck in transportation service competitive with the railroads, is being carried on in part at the expense of the Federal and state governments, so that a substantial portion of the cost

of such competitive cost is in effect being borne by the general public as contrasted with shippers and receivers of freight. Included in this general public which is being taxed to support, in part, this water competition are the railroads. The difficulties which the railroads in the Western District encounter in meeting this competition and undertaking to maintain their traffic and revenues are obvious.

The diversion of freight traffic to the automobile truck has proceeded already to a point where a substantial portion of the short haul freight traffic has been lost by the rail carriers. Coincident with this, there has been a marked tendency on the part of regulatory authority to require reductions in freight rates for the longer hauls with the result that, in many instances, the rail carrier is being required not only to witness a diversion of short haul traffic to the highway, but coincidentally to receive reduced revenues on the long haul traffic which is still transported by railroad.

The facts which we have heretofore stated have no direct relation to the present depression in business in the United States. Their adverse effect upon the railroads in the Western District has necessarily been emphasized by the condition which has confronted the country during the current year. A revival of the trade and commerce of the country would not, however, in and of itself solve the problems incident to the maintenance of adequate transportation by railroad for the future in the Western District.

Shortly before the beginning of the current year, the railroads in our District, together with other railroads

in the United States, were requested by high public authority to undertake, in so far as it was possible to do so, such constructive programs of capital expenditures as would, in the phblic interest, assist in alleviating the depressed condition of industry and in overcoming threatened unemployment. In response to this request, we laid out specific programs of capital expenditures in an effort to achieve the desired result, which programs have been carried out in so far as possible. More recently, during the period in which the drought conditions adversely affected portions of the country, together with a consequent untoward effect on business, we were asked to reduce rates for the movement of livestock from the drought-stricken areas and of hay, water and feed into such areas and we have undertaken to provide reduced rates for this purpose, generally 33⅓ per cent below the regular rates, resulting in a further diminution of revenue during the period in which these emergency rates remain in effect.

We direct attention to these considerations of National concern for the reason that we believe it to be in the public interest that the railroads should be so situated as to be able to cooperate in times of need. Without undertaking to make any predictions as to the future on this score, we submit that any general rate reductions, or, in fact, any material reductions of rates on commodities which constitute a substantial portion of the tonnage of the Western railroads, would menace our already insufficient revenue to a point where grave consequences may ensue.

We direct your attention to the fact that the volume of freight traffic in our District, as measured by current car loadings, has thus far shown no sign of improvement and that the reduction in the volume of traffic has been so severe that it cannot be expected again to reach a normal level for a long period of time. During the first six months of the present year, the railroads as a whole in the Western District received a total net railway operating income which is actually less than one-half of the annual interest charges on the funded and unfunded debt; and in many instances individual carriers, serving large sections of the West, found their earnings so seriously impaired as to fail to produce any substantial part of the annual interest charges. While normally the Western District carriers receive a greater net railway operating income in the latter half of the year,* these results of present operation demand serious consideration.

Even prior to the drastic decline in the volume of business, the railroads in the Western District as a whole were not able to pay dividends to their stockholders in keeping with the risk attendant upon investment in this character of securities. In this and other respects, the railroads of the Western District were in a much more unfavorable condition, in comparison with railroads in other sections, than existed in the period prior to the World War. We submit to you that if the railroads in the Western District are to continue to furnish adequate transportation facilities for the people in that section

*During the five years ended December 31, 1928, the average net railway operating income earned in the first six months amounted to 33.1 per cent of the total for the year.

of the United States which they serve, they should not be called upon to absorb any more general rate reductions at this time, or until the returns from operation are in a much more satisfactory condition than at present.

During the current year, one of the results of the falling off in traffic has been a reduction in the number of employes as compared with the previous year. This reduction has been progressive throughout 1930. Thus, in January, 1930, there were on the Western District railroads 12,446 less employes than in January, 1929, while in August, 1930, there were 105,645 less employes than in August, 1929. This is the direct result of two conditions, first, the reduction in traffic and, second, the imperative necessity of curtailing current expenses for maintenance in the face of a diminution of revenue. We cannot fail to emphasize the fact that any further reduction in gross income resulting from general rate reductions must, in the long run, effect employment conditions. Thus far, wage levels have been maintained and a reduction in the purchasing power of railroad workers, through the medium of wage reductions, avoided. As the necessity arises of meeting not only a decline in traffic, but also a diminished revenue from the traffic actually handled, there cannot fail to be a further effect upon the employment situation.

Earlier in the present year the Western carriers were led to expect an increase in freight rate levels in their territory in the decision of this Commission in *Western Trunk Line Class Rates,* 164 ICC 1, effective November 1st, 1930, wherein they were directed to make a readjust-

ment of class rates in Western Trunk Line territory which, it was estimated by the Commission in a statement for the press, would produce additional revenue of from $10,000,000.00 to $12,000,000.00 per year, although the severe reductions required in the long distance rate and the continued increased use of automobile trucks for short haul transportation make us doubt greatly whether such amount of increased revenue will be realized. This increase also was contingent upon concurrently favorable action of the several state commissions in the territory, none of which except the Missouri Commission so far has approved the revision; in fact, in some instances active opposition has been encountered. So far as the Western District is concerned, the opportunity of securing any increase in total revenue through the *Class Rate decision,* or even of maintaining our present general freight rate level, has been more than offset by the order in the proceeding entitled *Grain and Grain Products in the Western District;* 164 I. C. C. 619, which, as amended, is scheduled to become effective January 1, 1931. The rate reductions contained in that order as they affect the railroads in the Western District would result in a total loss of revenue, in so far as we have been able to estimate it, of $20,000,000.00 a year. Under such a rate readjustment there would result not an increase in revenue, but instead a total net reduction in rate levels, notwithstanding the recognition by your honorable Commission of the urgent need of increased revenue as recently as your decision in *Rate Structure Investigation,* Docket No. 17000, Part 2, *Western Trunk Line Class Rates,* 164 ICC 1, 177, decided May 6, 1930.

The freight rate levels in our territory today fail to reflect, even approximately, the increased costs of operation, as compared with the pre-war period. Labor and material costs and taxes continue on a relatively high level, whereas, in the face of a declining passenger traffic and a falling off in freight traffic, we have been required to cope with the additional problem of reductions in the price for which we must sell our product, i. e., transportation. The Western District railroads serve approximately two-thirds of the total area of the United States, which area is dependent upon their successful operation for its transportation. Railroad employes in this area constitute a substantial portion of the total number of persons gainfully employed therein. Investments in securities of the Western railroads are widely distributed among individuals, banks, trust companies, insurance companies and corporations, who are largely dependent upon the integrity of these investments and the regularity of interest and dividend payments as a matter of security to themselves. Conversely, these carriers are dependent upon marketing their securities in order to secure necessary additional capital in the conduct of their business.

We are submitting for your consideration some of the outstanding facts of the present situation. Among these are:

1. Present income of the Western District railroads has become insufficient to insure the maintenance of adequate transportation for the future.

2. Carriers in the Western District as a whole cannot expect to continue constructive programs of capital ex-

penditures in the fact of further diminution of their inadequate revenue.

3. In no year since 1920 have carriers in the Western District as a whole been in receipt of earnings equivalent to a fair return upon the value of their property.

4. The decline in passenger travel by railroads continues to reduce income of these railroads to a disturbing degree.

5. Forms of competitive and, to a large extent, unregulated transportation which have been and are being developed, some by government aid, have prevented the normal growth of freight traffic on the railroads.

6. The great decline in car loadings of freight in the Western District continues and there is no immediate promise of its restoration to a normal level.

7. Freight rate levels in the Western District, when measured by any standard, fail to reflect the increase in operating costs compared to the pre-war level to the same extent as in the remainder of the United States.

8. Before the War, railroads in the Western District were able to pay to their stockholders dividends, although modest, in a greater ratio to their capital stock than in the remainder of the United States. This situation has been completely reversed.

9. Railroad net operating income in the Western District has been so depleted during the present year that, for the first six months thereof, it is less than the interest accruals upon the funded debt, with no margin for either dividends or surplus.

10. The curtailment of expenditures for maintenance of ways and structures and equipment, which has been necessary in the face of reduced income, has proceeded to a point where the necessity for further action along this line cannot be viewed as in the public interest.

11. Even with a restoration of general business conditions and traffic volume to a more nearly normal level, it will take the Western railroads a considerable period to solve the problems which the present situation has forced upon them, even if more disastrous consequences of the present situation are to be avoided.

As indicative, but in no sense comprehensive, we present below in tabular form certain outstanding facts of the present situation which we ask be given consideration in the light of the foregoing statement.

I.

DEFICIENCY IN RATE OF RETURN.

In 1920, this Commission established an aggregate value for railroads in the Western District upon which a fair return at 5.75 per cent amounted to $465,750,000 on an annual basis.[1] The integrity of this aggregate value as of 1920 was affirmed in 1922[2] and again in 1924.[3]

(1) **Increased Rates**, 1920, 58 ICC 220, 229. This included Class I, II and III carriers, while the remaining figures set forth above exclude Class II and III carriers because of the unavailability of data in respect to them. This does not affect the comparison because of the relatively small mileage and value of Class II and III railroads.

(2) **Reduced rates**, 1922, 68 ICC 676, 684.

(3) **Rates and charges on grain and grain products**, 91 ICC 105, 119.

In the decade between January 1, 1920 and December 31, 1929, there was added to the property value of Class I Railroads alone, additions and betterments less retirements, at a cost of $2,154,000,000.00. An annual return of 5.75 per cent upon this increase in value amounts to $123,855,000.00. This added to the annual required fair return as of 1920, produces a required figure for 1929 of $589,605,000.00

This is the annual amount required, under the most conservative method of computation, to insure the maintenance of adequate transportation through the medium of a fair return as defined in the existing law. Based upon the valuations claimed by the railroad companies, substantially higher earnings would be necessary to constitute a fair return.

The failure of carriers in the Western District to approach even this measure of earnings is shown by the following table:

NET RAILWAY OPERATING INCOME—WESTERN DISTRICT
(Class I carriers and Large Switching and Terminal Companies)

Year	Net Railway Operating Income
1921	$284,785,575.00
1922	324,197,955.00
1923	374,556,464.00
1924	378,080,991.00
1925	414,405,439.00
1926	454,051,723.00
1927	407,881,895.00
1928	464,601,371.00
1929	492,841,171.00
1930 (6 mos.)	113,760,610.00

It will be observed that in 1929, which was the year of largest net railway operating income for carriers in

the Western District since the war, there was a shortage below a fair return on ascertained property value, plus added property, of $96,764,000.00. We believe the true value of railroad property when determined in conformity with decisions of the Supreme Court of the United States will be substantially greater and in consequence the shortage below a fair return considerably larger.

For the first six months of 1930 the net railway operating income shown is $113,760,610.00. This is less than half the annual interest charges on funded and unfunded debt of Western District carriers in 1928, the last year for which data are available. Such interest charges were $266,815,224.00 (I.C.C. Statistics, Statement No. 24.)

In the two later months of July and August for which certain data is now available, the net railway operating income has continued to be radically below that of the same months in the two preceding years, as follows:

NET RAILWAY OPERATING INCOME—WESTERN DISTRICT
—July and August

1928	$ 95,028,103
1929	114,161,588
1930	83,846,587

As is pointed out in a later section of this statement, even this amount of net railway operating income for July and August, 1930, has been secured only by a drastic curtailment of expenditures for maintenance in these months.

II.

PROGRAM FOR EXPENDITURES FOR ADDITIONS AND BETTERMENTS, 1930.

The Western District railroads submitted to the President of the United States, in December, 1929, a program for capital expenditures for 1930 in the total amount of $365,000,000.00. Of this, $148,000,000.00 was for equipment and $217,000,000.00 for roadway structures. These appropriations exceed by $43,725,000.00 the expenditures for the previous year.

It was estimated that $73,000,000.00 would be expended in the first quarter. Reported actual expenditures during that period total $75,277,000.00, showing that the program was adhered to during that period. For the second quarter the advance estimate was $126,000,000 and the actual expenditures were $119,142,000.

In the preceding section of this statement a complete failure to earn any return on large amounts of new property added since 1920 has been noted, which fact must be given consideration in planning and financing programs of further capital expenditures.

III.

DECLINE IN PASSENGER REVENUE.

There has been a continued decline in passenger revenue due to the diversion of travel to other modes of transportation. While this has resulted in some reduction of operating expenses, the saving has by no means been commensurate with the loss. This decline in passenger revenue is shown in the following table:

TREND OF PASSENGER REVENUE—WESTERN DISTRICT
1920—1929

Year	Passenger Revenue Account 102	Ratio to 1920
1920	$526,091,040.00	100.00
1921	441,783,047.00	83.97
1922	396,976,124.00	75.46
1923	415,125,825.00	78.91
1924	379,156,301.00	72.07
1925	355,648,823.00	67.60
1926	344,585,865.00	65.50
1927	325,304,179.00	61.83
1928	296,630,199.00	56.38
1929	286,433,114.00	54.45
Total Decreases below 1920		$1,493,175,883
Average per year		$ 165,908,431

The decline in passenger revenue has continued into the present year and in the light of the previous data cannot be assumed to reflect merely a depressed industrial condition.

PASSENGER REVENUE—WESTERN DISTRICT

1st 6 months	
1929	$141,984,258.00
1930	120,253,012.00
Reduction	$ 21,731,246.00
Percent	15.31%

IV.

REDUCTION OF FREIGHT TRAFFIC.

For the first six months of 1930, freight revenue of the Western District railroads fell off $105,292,672 under the first six months of 1929, a reduction of 12.14 per cent.

Revenue freight car loadings continue to show a progressive decline below the preceding year as is set forth in the following table:

REVENUE FREIGHT CAR LOADINGS—WESTERN CLASS I ROADS

Week Ended		1930	1929	Decreases 1930 under 1929	Per Cent Reduction
Jan.	4	274,363	286,382	12,019	4.20
	11	301,154	320,180	19,026	5.94
	18	288,242	331,880	43,638	13.15
	25	291,083	317,608	26,525	8.35
Feb.	1	312,001	324,580	12,579	3.88
	8	308,515	323,594	15,079	4.66
	15	311,742	329,696	17,954	5.45
	22	281,852	312,846	30,994	9.91
Mar.	1	321,711	342,840	21,129	6.16
	8	306,821	330,321	23,500	7.11
	15	313,306	327,940	14,634	4.46
	22	306,971	333,270	26,299	7.89
	29	305,592	331,429	25,837	7.80
April	5	316,711	324,873	8,162	2.51
	12	316,789	328,148	11,359	3.46
	19	313,037	353,485	40,448	11.44
	26	321,766	372,666	50,900	13.66
May	3	335,541	379,470	43,929	11.58
	10	340,149	381,302	41,153	10.79
	17	344,535	375,063	30,528	8.14
	24	346,030	385,845	39,815	10.32
	31	323,147	353,156	30,009	8.50
June	7	354,446	387,635	33,189	8.56
	14	349,785	392,991	43,206	10.99
	21	350,952	398,850	47,898	12.01
	28	358,117	413,708	55,591	13.44
July	5	310,192	349,117	38,925	11.15
	12	354,279	407,925	53,646	13.15
	19	362,116	417,640	55,524	13.29
	26	355,260	425,025	69,765	16.41
Aug.	2	360,362	425,597	65,235	15.33
	9	353,934	417,033	63,099	15.13
	16	362,391	423,936	61,545	14.52
	23	364,041	433,959	69,918	16.11
	30	381,647	439,948	58,301	13.25
Sept.	6	337,517	384,916	47,399	12.31
	13	368,439	438,206	69,767	15.92
	20	368,015	448,600	80,585	17.96
	27	373,684	464,358	90,674	19.53
Oct.	4	379,195	470,150	90,955	19.35
Total 40 weeks		13,325,430	15,006,168	1,680,738	11.20

This includes Northwest, Central West and Southwest Regions.

V.

FREIGHT RATE LEVELS.

A convenient and reasonably accurate measure of general freight rate levels is the average revenue per ton per mile of all freight. When considered in the light of average hauls and changes in commodity movement, it reflects the true situation. There have been no such changes in average haul or altered commodity movement as would explain away the adverse showing upon Western District railroads of a comparison of ton-mile earnings.

The freight rate level in the Western District is much lower in comparison with the pre-war period than in either the East or South.

INCREASE IN AVERAGE REVENUE PER TON MILS

1929 over 1915	Per cent of Increase
Eastern District	68.7%
Southern District	41.3
Western District	32.3

Since 1921, there has been a decline in freight rate levels in all sections, but the reduction in the West has been more drastic than in either the East or the South.

REDUCTION IN FREIGHT RATE LEVELS

(Based on Average Revenue per Ton Mile)

1929 below 1921	Per cent of Reduction
Eastern District	12.3%
Southern District	16.3
Western District	18.3

Costs of railroad operation have increased approximately the same in all sections. Labor is about twice as costly as before the war, taxes more than twice as great and material costs probably 60 per cent higher. Yet the general freight rate level in the West is only 32.3 per cent higher than in 1915, as compared with a 68.7 per cent increase in the Eastern District and 41.3 per cent in the Southern District. The reduction in revenue per ton mile in the Western District between 1921 and 1929 was 2.6 mills. Inasmuch as 160,738,301,279 revenue ton miles were carried by Class I carriers in the Western District in 1929, this reduction in ton mile earnings resulted in a reduction in gross and net revenue in that year of $417,919,583, an amount equal to four-fifths the net railway operating income of that year.

In 1925, the Western District railroads sought an increase of 5 percent in their freight rates, which was denied by the Commission in *Revenues in Western District,* 113 ICC 3, on the ground that they had failed to prove that an emergency existed which would justify a horizontal advance of this character. This decision was dated July 14, 1926. Since that time, the freight rate level as measured by average ton mile earnings has further declined in the Western District to the extent of 2.11 percent. In other words, not only were Western District railroads denied permission to increase their freight rates by 5 percent, but in the period since 1926 they have actually suffered an average reduction in their freight rate level of 2.11 percent. The change in freight rate levels in the three districts since 1926 is set forth in the following table:

RELATIONSHIP OF FREIGHT RATE LEVEL IN 1929 TO 1926.

(Based on average revenue per ton mile)

	Western District	Eastern District	Southern District
Average revenue per ton mile—1926	11.87 mills	10.94 mills	9.01 mills
Average revenue per ton mile—1929	11.62 mills	10.90 mills	9.03 mills
Reduction, 1929 under 1926	0.25 mills	0.04 mills	(incr.) 0.02 mills
Percent Reduction	2.11%	0.37%	(incr.) 0.22%

While the reduction of .25 mills per ton per mile in the Western District, or a reduction of 2.11 percent, between 1926 and 1929 may seem small when these figures alone are considered, the financial effect is indeed serious. Thus, in 1929 the revenue ton miles of Class 1 railroads in the Western District were 160,738,301,279. A reduction of .25 mills per ton mile on this volume of traffic amounts to $40,184,575. In other words, if there had been no reduction in the revenue per ton mile between 1926 and 1929, Class 1 carriers in the Western District would have received $40,184.575 more gross and net revenue than they did receive. The reduction in average ton mile earnings between 1926 and 1929 resulted in diminishing the net railway operating income of these Western District railroads in 1929 by one-twelfth.

In addition to reductions in revenue which have come about by reason of reduction in rates for the future, we have also been required to pay out of operating revenues large amounts of money by reason of orders of the Interstate Commerce Commission and of certain of the state commissions wherein reparation on past shipments has been awarded. In the two years of 1928 and 1929 approximately $2,500,000 was paid out by Western District railroads in compliance with formal orders of the Inter-

state Commerce Commission in contested cases awarding reparation on past shipments and a considerable additional amount on account of similar orders of some of the state commissions.

VI.

COMPENSATION TO STOCKHOLDERS.

Prior to the war, stockholders of Western railroads received relatively greater dividend payments than in other sections of the United States. This situation has been reversed as shown by the following table from Statistics of Railways for the years 1917 and 1929, the latest year for which data have been published.

RATIO OF DIVIDENDS PAID TO ALL STOCK OUTSTANDING
(Class I Railroads)

	1917	1929
Eastern District	3.95%	6.91
Southern District	3.90	6.92
Western District	4.93	4.88

Total dividend payments in the East and South have greatly increased in both amount and percentage, while in the West the slight increase in the amount of dividend payments has not kept pace with the increase in stock outstanding evidenced by the above decline in the rate paid thereon.

TOTAL DIVIDENDS DECLARED
(Class I Railroads)

	1917	1929	Per Cent Increase
Eastern District	$107,011,295.00	$222,837,893	108.24%
Southern District	40,272,506.00	85,598,478	112.55
Western District	173,111,987.00	181,689,302	4.95

More striking is the fact that railroads in other sections have been able to increase greatly their dividend payments out of current income (as contrasted with surplus) while dividend payments out of current income have declined in the West.

DIVIDENDS DECLARED FROM CURRENT INCOME
(Class I Railroads)

	1917	1929	Per Cent Increase
Eastern District	$81,253,432.00	$128,387,266	58.01%
Southern District	3,640,080.00	10,721,502	194.54
Western District	135,928,861.00	122,192,062 Decr.	10.11

VII.

REDUCTION IN MAINTENANCE CHARGES.

As a part of the retrenchment program forced upon them during the current year, the Western District carriers have been obliged to restrict their expenditures for maintenance of their properties. In some instances this constitutes deferred maintenance which, with a restoration of normal traffic, will have to be made up. The extent of reduction in maintenance charges is shown in the following table.

EXPENDITURES FOR MAINTENANCE—WESTERN DISTRICT
(Class I carriers and large Switching and Terminal Companies)

1st 6 Months	Maintenance of Ways and Structures	Maintenance of Equipment
1924	$155,875,328.00	$224,478,002.00
1925	150,926,111.00	217,972,492.00
1926	160,273,398.00	217,580,061.00
1927	170,168,703.00	211,531,221.00
1928	168,911,131.00	207,066,719.00
1929	168,448,551.00	210,169,731.00
1930	152,208,750.00	193,702,933.00

Since the foregoing table was made up the figures for July and August have become available. These show an even more drastic reduction than in the preceding six months in expenditures for maintenance as follows:

FURTHER CURTAILMENT IN EXPENDITURES FOR MAINTENANCE IN JULY—WESTERN DISTRICT.

	July, 1929	July, 1930	Reduction	Reduction Percent
Maintenance of Ways and Structures	34,340,298	26,715,577	7,624,721	22.20%
Maintenance of Equipment	35,905,457	30,556,316	5,349,141	14.90%
Total Maintenance	70,245,755	57,271,893	12,973,862	18.47%

For the month of August a further curtailment is shown by the following table:

EXPENDITURES FOR MAINTENANCE IN AUGUST—WESTERN DISTRICT

	August, 1929	August, 1930	Reduction	Reduction Percent
Maintenance of Ways and Structures	$34,151,568	$25,572,931	$8,578,637	25.12%
Maintenance of Equipment	35,919,821	29,251,240	6,668,581	18.57%
Total	$70,071,389	$54,824,171	$15,247,218	21.76%

It is apparent that these Western District carriers are being compelled to curtail their expenditures for maintenance in a continually increasing ratio.

VIII.

REDUCTION IN NUMBER OF EMPLOYEES.

With a smaller freight and passenger traffic coupled with necessary curtailment of maintenance programs, there has been a progressive reduction of the number of

employes as compared with a year ago. The following tables are made up from the Interstate Commerce Commission wage statistics for the latest available period.

NUMBER OF RAILROAD EMPLOYES
Western District

	1929	1930	Decrease
January	592,250	579,804	12,446
February	596,925	572,103	24,822
March	608,910	577,738	31,172
April	634,268	595,479	38,789
May	657,694	614,695	42,999
June	670,034	595,223	74,811
July	672,989	584,938	88,051
August	679,314	573,669	105,645

The reduction in labor as compared with the preceding year, has been brought about wholly by a reduction in force and not by a reduction in wage scales. This reduction is as follows:

COMPENSATION OF EMPLOYES
Western District

	1929	1930	Decrease
January	$87,358,354.00	$85,795,056.00	$ 1,563,298.00
February	81,790,045.00	77,856,841.00	3,933,204.00
March	88,543,084.00	83,678,260.00	4,864,824.00
April	89,807,715.00	84,106,583.00	5,701,132.00
May	93,811,712.00	86,032,408.00	7,779,304.00
June	93,061,595.00	81,839,655.00	11,221,940.00
July	97,253,281.00	82,964,533.00	14,288,748.00
August	99,295,087.00	82,046,271.00	17,248,816.00
Total	$730,920,873.00	$664,319,607.00	$66,601,266.00
Avge. per man per month	$143.00	$142.00	

The average reduction of one dollar per man per month reflects a reduction of overtime payments and not a reduction of wage rates.

IX.

DIVERSION OF TRAFFIC FROM THE RAILROADS.

Motor Bus and Truck Competition

More detailed information of the extent and volume of motor bus and truck transportation than is now available will undoubtedly be developed in the investigation now in progress by the Commission entitled *Coordination of Motor Transportation,* Docket 23400.

The growth of this form of transportation is indicated by the increase in registration of motor trucks. In the Western District in 1920 there were state registrations of 391,400 motor trucks; in 1923 there were 610,194 and in 1928 there were 1,333,848. Likewise there has been an increase in motor bus service for passenger transportation. Data are not available separately for the Western District, but for the United States the following table discloses important facts.

GROWTH OF MOTOR BUS OPERATION
As of January first

	1925	1929
Buses operated	53,200	92,400
Operating Companies	20,300	23,300
Miles of Route	345,500	719,500
Passengers Carried	870,000,000	1,793,000,000

Source: National Motor Bus Division, American Automobile Association

The nature of this competition so far as it affects Western District railroads is disclosed by the fact that as to one important western carrier operating approximately

10,000 miles of line throughout large sections of the west[1], 35 competitive motor bus companies operate over 11,205 miles in the same territory served by the carrier and 358 regularly operated motor truck lines operate over 36,840 miles in competitive territory. On a subsidiary of the same rail carrier operating 700 miles of line[2], the entire line is parallelled with competing motor bus and truck service.

An increasing variety of freight is being diverted to the highways. Trucking of cotton in the southwest has shown a large increase. Short haul livestock traffic is handled by trucks in increasing volume as evidenced by the fact that in 1929 at Omaha, Nebraska, 43.4 percent of the of the hogs reached that market in trucks, at St. Joseph, Missouri, 52.6 percent and at Sioux City, Iowa, 64.5 percent. By the use of an automobile truck and trailer, there is a large movement of new automobiles from Detroit, Michigan, and South Bend, Indiana, to destinations on the Missouri River. The radius of operation of motor trucks is being continuously extended and trucks of increased tonnage capacity are supplanting the smaller type.

The fact that the trucks are not merely absorbing a part or all of the normal increase in less than carload traffic, but instead are making inroads into the volume of tonnage heretofore carried by railroad, is disclosed by the following table.

---

1 Chicago, Burlington & Quincy Railroad Company

2 Fort Worth & Denver City Railway Company

TONS LESS THAN CARLOAD FREIGHT CARRIED—WESTERN DISTRICT

Year	Tons Carried
1916	26,115,830
1917	26,523,906
1918	25,569,512
1919	25,831,244
1920	25,934,326
1921	18,908,594
1922	19,244,769
1923	19,825,973
1924	18,929,743
1925	18,870,830
1926	18,717,991
1927	18,047,077
1928	17,431,137
1929	17,298,619

The average of less than carload freight carried for the five years 1916-1920 was 25,994,964 tons. In the year 1929, there was a reduction of 8,696,345 tons below this average. The revenue effect of this loss of tonnage may be obtained by multiplying this figure by $11.80 per ton, this being the amount received per ton of less than carload freight by Western District carriers in 1929. The total loss of revenue in the year 1929 disclosed by this computation is $102,616,871.00.

Waterway Transportation

The annual reports of the Inland Waterways Corporation show tonnage transported on the lower and upper Mississippi divisions as follows:

TONNAGE ON MISSISSIPPI DIVISIONS

Year	Tons
1918	23,378
1919	104,769
1920	160,702
1921	443,267
1922	599,669
1923	710,431
1924	849,503
1925	910,755
1926	1,045,627
1927	1,251,513
1928	1,555,208
1929	1,398,826

In addition there has been a growth of independent operators of fleets on the inland waterways whose tonnage figures are not available.

Growth in waterborne traffic through the Panama Canal with an increasing loss of tonnage to the rail carriers is shown in the following table:

CARGO PASSING THROUGH THE PANAMA CANAL

Year	Long Tons
1915	4,888,000
1920	9,374,000
1923	19,567,875
1926	26,037,448
1929	30,663,006

Natural Gas

Until recently, pipe lines for the transportation of natural gas in the Western District were largely confined to the states of Texas, Oklahoma, Arkansas, southeastern Kansas and southern California. Within the past four years, there has been an extensive further construction in these states and in addition pipe lines for the transportation of natural gas have been extended from the Mid-Continent field to St. Louis, Kansas City, St. Joseph, Missouri, to Omaha, Lincoln and Superior, Nebraska, to Pueblo, Colorado Springs, Denver and Boulder, Colorado and intermediate territory. There are also now either under construction or in prospect of early development further construction of pipe lines for the distribution of natural gas from the Mid-Continent field to Des Moines, Iowa, Minneapolis, Minnesota, and Chicago, Illinois. Data are not presently available as to the extent of use of nat-

ural gas transported in this manner, but in many territories the use of coal has been thereby supplanted not only for domestic consumption, but also for industrial uses. The Oil and Gas Journal is authority for the statement that there are now approximately 60,000 miles of natural gas pipe lines in the United States and that a large additional mileage is in prospect of early construction. Not only is there construction of pipe lines for natural gas from the Mid-Continent field, but natural gas from other fields has recently been piped into Salt Lake City, Utah, San Francisco, California, and other points in Wyoming, Montana, North Dakota and South Dakota.

CONCLUSION.

We believe the present conditions surrounding the railroad industry in the Western District demonstrate the urgent need of co-operative effort between those who regulate the railroads, those who operate them and those who use them in order than an adequate system of transportation for the present and the future shall be assured. We most earnestly ask you to give to such facts as we have presented the weight to which they are entitled in administering the grave responsibility which Congress has placed upon you in the Interstate Commerce Act.

Respectfully submitted,

L. W. BALDWIN,
President, Missouri Pacific Railroad Company,

A. D. MCDONALD,
Vice Chairman, Executive Committee, Southern Pacific Company,

CHARLES DONNELLY,
President, Northern Pacific Railway Company,

FRED W. SARGENT,
President, Chicago & North-western Railway Company,

L. A. DOWNS
President, Illinois Central Railroad Company,

H. A. SCANDRETT,
President, Chicago, Milwaukee, St. Paul & Pacific Railroad Company,

J. E. GORMAN
President, Chicago, Rock Island and Pacific Railway Company,

W. B. STOREY,
President, Atchison, Topeka & Santa Fe Railway Company,

CARL R. GRAY,
President, Union Pacific Railway Company,

E. E. WILLIAMSON,
President, Chicago, Burlington & Quincy Railroad Company,

In behalf of the Western Association of Railway Executives.

WESTERN ASSOCIATION OF RAILWAY EXECUTIVES

CHICAGO, ILL.

Chicago, November 26, 1930.

HON. FRANK MCMANAMY,
Chairman,
Interstate Commerce Commission,
Washington, D. C.

Dear Sir:

We wish to thank you for your letter of November 10, 1930, regarding our printed statement submitted to the Commission under date of October 25, 1930. Your letter was considered at a meeting of the Western Association of Railway Executives and this reply is sent to you in accordance with the directions of that Association.

Your letter, in expressing the views of the Commission, concludes as follows:

> "The matters to which you have directed our attention are important and are such that we have borne and will bear them in mind for appropriate consideration in the administration of the act. The statement makes no suggestion as to any action by us deemed by you to be feasible to relieve the revenue situation of the Western railroads or legally necessary in the premises; should such requests be presented, they will be given earnest and prompt consideration."

We did not include in our previous communication any specific suggestions as to necessary action on your part because we desired to avoid a discussion of proceedings pending before you. As a major portion of our freight rates is under consideration in your *Rate Structure Investigation*, specific suggestions cannot be divorced from pending cases.

We face the problem that in 1929, the best year for Western railroads since the Transportation Act, 1920, became effective, we were short by $96,764,000 of a fair return on the aggregate value of property as found by the Commission in 1920 plus property added since that time. More serious, however, is the fact that for the first nine months of the present year our net railway operating income is $112,332,733 below what it was for the same period in 1929. Some railroads are having difficulty in meeting their bond interest, others have been required to reduce their dividends to stockholders and all have faced the necessity of effecting large reductions in the number of men employed.

Since our original statement was presented, petitions filed by the railroads and others to reopen the proceedings entitled *Grain and Grain Products*, 164 I. C. C. 619, have been denied. We therefore face a further loss in revenue of $20,000,000 a year, which revenue loss we are in no position to meet. A specific suggestion on our part is that, in the light of the facts now present and the adverse change in conditions since the record in this case was closed almost two years ago, the operation of this order be suspended during the existence of the present emergency and for a period of not less than one year from

January 1, 1931. We ask this so we may be relieved of the necessity of coping with this further drastic loss of much needed revenue in the face of the acute situation which confronts us. We cannot hope to recoup this loss of revenue from other traffic prior to the date these reduced grain rates are required to be made effective under your order. The present situation is the result of conditions to which we called your attention in our previous communication, many of which could not have been foreseen either by regulatory authority or by the carriers. It has affected the entire railroad industry, including bondholders, stockholders and employes, as well. We believe our request to suspend the operation of this rate reduction during this emergency, or, at least, until some other means of recouping the loss in revenue shall have been provided, accords with sound public policy and, if granted, will be in the public interest.

Another situation of immediate importance is that which confronts us in respect to class rates in the Western Trunk Line territory. An appropriate upward revision of the long haul rates so that they will not involve reductions and the elimination of overhead rates between the East and West so that we may continue in effect the present combinations based on Chicago and related gateways, would relieve us of meeting drastic reductions on this traffic.

Another burden from which we believe we should be relieved is the increasing amount of reparation which we are being required to pay on past shipments. This constitutes a serious inroad upon current revenues. We ask that consideration be given by the Commission when

dealing with these matters to the effect upon railroad revenues of such reparation payments.

Another suggestion is that a more liberal attitude upon the part of public authority toward fourth section relief so as to enable the rail carriers to compete with the water carriers would be helpful and, we believe, feasible.

Recommendations to Congress for legislation regulating motor vehicle transportation and the transportation of artificial and natural gas and requiring certificates of convenience and necessity for all pipe lines construction including oil, gas and gasoline, would be helpful.

An investigation and study by the Commission of inland waterway transportation, its cost and the effect of this competition upon the rail carriers would, we believe, be helpful and desirable. We specifically request that the Commission fix water rates on a basis that would enable private water carriers to operate at a profit rather than on the present arbitrary twenty percent reduction from the rail rates. We also specifically request that in prescribing divisions between rail and water lines that the rail carrier should in no case be required to accept less than if the interchange were with a connecting rail carrier.

We have heretofore proposed a horizontal increase in freight rates in the Western District as an appropriate medium for increasing our revenue. This method was disapproved by the Commission in *Revenues in the Western District*, 113 I. C. C. 3, decided July 14, 1926. In other proceedings, including the *Rate Structure Investigation*, we have opposed reductions in rates on particular

commodities, and in some instances have proposed increases, in an effort to maintain our revenues, but have, in many instances involving commodities moving in large volume, been unsuccessful to the extent of witnessing a downward instead of an upward revision of our general rate level.

We wish to thank you for this opportunity to express our views which we have stated with a sincere desire to ameliorate the difficult problems now confronting the Commission, the railroads and the general public to the end that there shall be no impairment of railroad service in the Western District. Our suggestions made herein cannot be regarded as a panacea. Indeed, they are simply a beginning. Despite the fact that the need of western carriers for an increase in rates is now greater than ever before, we are not at this time asking a general increase. We are withholding such application not because we believe the situation does not warrant it, but because the psychological effect might be bad, and it is our purpose and desire to do our full part in the restoration of normal business conditions. The fact, however, that in 1929, the year of greatest volume of railroad traffic, and the year of greatest prosperity to industry in general, the western railroads earned far less than a fair return on the value of their property shows conclusively in the light of the improvements in operating efficiency and the heavy investments of additional capital, that the general freight rate level is too low. The whittling of freight rates by regulatory tribunals, and by what are termed voluntary reductions by the carriers, which are in most cases involuntary, can only be offset

in our judgment by increases made from time to time in the general level of rates.

The present situation of the carriers is in large part the direct result of regulation which has reduced our rates under orders which continue in effect until further orders of the Commission. This, of course, is a situation wholly within the control of the Commission. We earnestly urge that the trend of rate regulation be upward instead of downward and that there be a stoppage of the constant erosion of our rate structure. We believe it is universally admitted that the carriers are honestly, efficiently and economically operated, and urge some speedy financial help in order that this efficiency may be continued.

Yours very truly,

(Signed) L. W. BALDWIN
(Signed) CHARLES DONNELLY
(Signed) L. A. DOWNS
(Signed) J. E. GORMAN
(Signed) CARL R. GRAY
(Signed) A. D. MCDONALD
(Signed) FRED W. SARGENT
(Signed) H. A. SCANDRETT
(Signed) W. B. STOREY
(Signed) F. E. WILLIAMSON

On behalf of the Western Association of Railway Executives.

BEFORE THE

Interstate Commerce Commission

DOCKET NO. 17000

PART 7

RATE STRUCTURE INVESTIGATION GRAIN AND GRAIN PRODUCTS WITHIN THE WESTERN DISTRICT AND FOR EXPORT.

PETITION BY CARRIERS IN THE WESTERN DISTRICT FOR VACATION OR POSTPONEMENT OF THE ORDER HEREIN, AND FOR REHEARING AND RECONSIDERATION.

WALTER MCFARLAND,
ELMER A. SMITH,
P. F. GAULT,
DOUGLAS F. SMITH,
H. H. LARIMORE,
J. N. DAVIS,
A. B. MASON,
R. J. HAGMAN,
M. L. COUNTRYMAN, JR.,
R. S. OUTLAW,
A. B. ENOCH,
Their Attorneys.
Room 1025, La Salle Street Station,
Chicago, Illinois.

FREDERICK H. WOOD,
KENNETH F. BURGESS,
WILLIAM D. WHITNEY,
Of Counsel.

Dated, February 18, 1931.

BEFORE THE

Interstate Commerce Commission

RATE STRUCTURE INVESTIGATION
GRAIN AND GRAIN PRODUCTS WITHIN THE WESTERN DISTRICT AND FOR EXPORT.

Docket No. 17000
Part 7

PETITION BY CARRIERS IN THE WESTERN DISTRICT FOR VACATION OR POSTPONEMENT OF THE ORDER HEREIN, AND FOR REHEARING AND RECONSIDERATION.

Now come the carriers in the Western District, respondents herein, and, in their own behalf and in behalf of all carriers by railroad operating in the Western District and subject to the Interstate Commerce Act, and, reserving all and all manner of exceptions and objections to the validity of the order herein, petition the Commission to vacate and set aside, or postpone the effective date of, the order entered herein on July 1, 1930, to rehear and reconsider the same, and to reopen the proceedings for the taking of further evidence.

In support of this petition, petitioners respectfully show:

I.

On or about September 6, 1930, petitioners, by their joint petition duly filed with the Commission herein, prayed for rehearing and reconsideration of said order,

and separate groups of said petitioners and certain individual carriers, included among said petitioners, duly filed supplemental and additional petitions for rehearing and reconsideration, all of which petitions were denied November 11, 1930. Petitioners respectfully renew each and all of the grounds for rehearing contained therein, including all objections to the validity of the order on the record as made and in addition thereto bring to the attention of the Commission certain additional facts hereinafter set forth, including the results of operation for the year 1930, which were not available at the time of the filing of said petitions.

The record herein was closed on September 22, 1928. The order, which is now required to be made effective on April 1, 1931, was made and entered by the Commission on July 1, 1930. Since the date on which the record was closed, to-wit, September 22, 1928, there have been material and important changes in the financial condition of the respondents and in operating, traffic and transportation conditions in said Western District, which adversely affected and will continue adversely to affect the respondents herein and their revenues. Such changed conditions are material to a consideration of the propriety and legality of the order hereinbefore made herein, the effect of which is materially to reduce the revenues of the respondent carriers in the Western District.

Conditions throughout the Western District, particularly the conditions relating to the earnings of said respondents, have so changed since the time when the record herein was closed that, regardless of whether said order reducing the rates and revenues of said respondents might have constituted a valid and proper exercise

of administrative discretion in the light of the conditions disclosed by the record (which, however, petitioners expressly deny), it would no longer be proper or lawful in the light of conditions now existent.

II.

In further support of this their present petition, petitioners allege and, if this petition be granted and a rehearing had, offer to prove the following facts:

1. The order entered herein, which by its terms, as amended, becomes effective April 1, 1931, will, if it becomes effective, reduce the gross and net revenues of the carriers in the Western District not less than $20,000,000 annually.

2. Under the accounting rules of the Commission, the fiscal year of all carriers subject to the Interstate Commerce Act ends on December 31. At the close of the record herein, to wit, September 22, 1928, the latest available annual statistics in respect of either the gross revenues or net railway operating income of the carriers in the Western District were those for the year ended December 31, 1927, and no statistical data covering any year subsequent to 1927 were offered or made a part of the record herein. The gross revenues and net railway operating income of the carriers in said district in the year 1927 were lower than in either of the two preceding years, or than in either of the two subsequent years, but substantially higher than in 1930. The freight and passenger revenues respectively, and the aggregate of the two for the first eleven months of the years 1927,

1928, 1929 and 1930 of Class I carriers and large switching and terminal companies, were as follows:

FREIGHT REVENUE—WESTERN DISTRICT.

11 Months Period	Revenue
1927	$1,631,941,138
1928	1,705,068,891
1929	1,749,323,876
1930	1,498,358,368

PASSENGER REVENUE—WESTERN DISTRICT

11 Months Period	Revenue
1927	$298,497,461
1928	272,177,906
1929	263,358,305
1930	214,041,593

TOTAL FREIGHT AND PASSENGER REVENUE

11 Months Period	Revenue
1927	$1,930,438,599
1928	$1,977,246,797
1929	$2,012,682,181
1930	$1,712,399,961

The revenues of said carriers from passenger traffic were in the first eleven months of 1930, 18.73% lower than in the corresponding period of 1929; the freight revenues of said carriers were in the first eleven months of 1930, 14.35% lower than in the corresponding period of 1929; and the aggregate revenues were 14.92% lower than in the corresponding period of the preceding year. By reason of the time required for the compilation of earnings statements, complete figures in respect of the revenues of the said carriers for the month

of December, 1930 are not now available, but the volume of traffic carried in said month was substantially less than that carried in the month of December, 1929, and the relative earnings of said carriers for the years 1927, 1928, 1929 and 1930, are approximately as shown by the foregoing tables.

The gross revenues of the said carriers for the month of January, 1931 are not ascertainable, but the revenue car loadings of all Class I carriers in the Western District, which operate 93.48% of the total mileage therein, and whose gross revenues constitute 98.3% of the gross revenues of all carriers therein, for the first four weeks of January, 1931, the latest period for which such statistics are available, were, as contrasted with said car loadings in 1929 and 1930, as follows:

CAR LOADINGS WESTERN DISTRICT

Week ended	1929	1930	1931
January 3	286,382	274,362	220,692
10	320,180	301,154	259,117
17	331,880	288,242	259,833
24	317,608	291,083	252,825
Total 4 weeks	1,256,050	1,154,842	992,467

Said revenue freight car loadings, in addition to showing a material and substantial decline (14.06%) under those of 1930 and an even greater decline (20.98%) as compared with those of 1929, were relatively lower as compared with loadings of 1929 than those of the year 1930 as a whole. The number of revenue freight cars loaded by said Class I carriers in the year 1929 was 19,395,192, and in 1930 16,997,406, a reduction of

12.36%, while the car loadings for the first four weeks of January, 1931 were, as shown in the foregoing table, 20.98% below those of 1929. Although freight revenues do not vary in direct proportion with revenue car loadings, said car loadings in any two periods are a fair index of freight revenues, and the petitioners allege, and, if a rehearing be granted, will be prepared to show, that both the freight revenues and the passenger revenues of the carriers in the Western District during the month of January, 1931 were substantially lower than during the month of January, 1930.

3. (*a*) The decline in the net railway operating income of carriers in the Western District has been even greater than the decline in freight and passenger revenues of Class I carriers and Large Switching and Terminal Companies hereinbefore set forth. The net railway operating income of said carriers for the periods shown is as follows:

Year	Net Railway Operating Income
1925	$430,581,904
1926	469,070,972
1927	419,662,490
1928	475,572,474
1929	502,882,323
Average 1925-1929	459,545,033
1930	358,607,945*

*Net Railway Operating Income for 1930 is made up of the actual figures for Class I and Large Switching and Terminal Companies to which has been added $10,330,288, being the Net Railway Operating Income for 1929 of Class II, III, and Small Switching and Terminal Companies as shown in the "Statistics of Railways In The United States" for 1929. The Net Railway Operating Income of these carriers for 1930 is not available, but is not greater than that for 1929.

The net railway operating income of said carriers for the year 1930 is therefore not less than 28.69% lower than the net railway operating income of said carriers in 1929, as contrasted with a reduction in freight and passenger revenues of Class I carriers and Large Switching and Terminal Companies for 11 months of 14.92% and is 22% below the average net railway operating income for said carriers for the preceding five years. By reason of reduction in the volumn of traffic in the month of January, 1931, as compared with the month of January, 1930, hereinbefore set forth, the current net railway operating income of the carriers at the present time is materially less than that of 1930.

(*b*) In 1920, in *Increased Rates, 1920,* 58 I. C. C. 220, 229, the Commission, pursuant to the provisions of Section 15a of the Act to Regulate Commerce, determined the aggregate value for rate-making purposes, as of December 31, 1919, of the property of the carriers held for and used in the service of transportation in the Western District to be $8,100,000,000.

In 1922, in *Reduced Rates, 1922,* 68 I. C. C. 676, 684, the Commission reaffirmed said basic valuation as of December 31, 1919; determined the fair rate of return which the carriers were entitled to receive under Section 15a to be 5.75%; and found that the carriers were not at that time earning a fair return upon said aggregate value. The Commission has not thereafter again found the aggregate value of said property in said District, or made any change in its determination as to the fair rate of return to be received thereon under said Section 15a. As stated in the special report of the Commission to the

Senate Committee on Interstate and Foreign Commerce, dated January 21, 1931, the determinations of aggregate value so made "did not reflect in any substantial measure the current costs of reproducing railroad properties" but "were made upon much the same plan as was followed in the determination of value * * * condemned by the Supreme Court in *St. L. & O'F. Ry.* v. *United States*, 279 U. S. 461."

The aggregate value for rate-making purposes of the property held for and used in the service of transportation by the carriers in the Western District (determined by adding to the basic valuation found in *Increased Rates 1920, supra,* all subsequent additions and betterments less retirements), the annual net railway operating income of said carriers and the rate of return on their aggregate value so determined for the years 1926, 1927, 1928, 1929 and 1930, were as follows:

Year	Aggregate Value as of January 1st	Net Railway Operating Income (Calendar Year)	Rate of Return
1926	$9,534,499,869	$469,070,972	4.92
1927	9,742,144,869	419,662,490	4.31
1928	9,975,940,869	475,572,474	4.77
1929	10,113,894,869	502,882,323	4.97
1930	10,320,808,869	358,607,945*	3.47

The true value of said property is substantially in excess of the value stated in this table, since the value

*Net Railway Operating Income for 1930 is made up of the actual figures for Class I and Large Switching and Terminal Companies to which has been added $10,330,288, being the Net Railway Operating Income for 1929 of Class II, III, and Small Switching and Terminal Companies as shown in the "Statistics of Railways In The United States" for 1929. The Net Railway Operating Income of these carriers for 1930 is not available, but is not greater than that for 1929.

stated in this table does not reflect the current reproduction cost, nor does it include any increment in the value of land or any increases in working capital since 1919, nor any additions to the property made during 1930. The statement of net railway operating income does not reflect either the reduction therein on account of reduced volume of traffic now being handled as compared with 1930, by reason whereof the current rate of return is materially less on the basis of the valuation employed than that of 1930, or the effect thereon of a reduction of not less than $26,000,000 in the net railway operating income of said carriers, if the order herein should be effective.

In order to produce a return of 5.75% upon the value of $8,100,000,000 found by the Commission as of December 31, 1919, a net annual railway operating income for all carriers in the district of $465,750,000 is required. Between January 1, 1920 and December 31, 1929 there were added to the property additions and betterments, less retirements, at a net cost of $2,220,808,869, 5.75% of which is $127,696,510. This added to the required fair annual return as of December 31, 1919 produces a total required net railway operating income for the year 1929 of $593,446,510. The net railway operating income of the said carriers for the Western District in the year 1929 was the largest in their history, but was nevertheless approximately $90,564,187 less, on this inadequate basis of valuation, than the return determined by the Commission to be fair, and was but 84.74% of the net railway operating income required to equal said return on such a basis of valuation. In 1930 the net rail-

way operating income of said carriers ($358,607,945*) was less by the sum of $234,838,565 than the prescribed fair return upon the value of said property so determined (exclusive of any return whatsoever upon the cost of additions and betterments, less retirements, made in the year 1930) and amounted to but 60.43% of the amount required. By reason of decrease in 1931 in volume of traffic and in gross revenues under those of 1930, the current ratio of net railway operating income to aggregate value represents a rate of return materially below said percentage, and the effect of the order herein is further to reduce the net railway operating income of the said carriers by not less than $20,000,000 per annum.

(*c*) The investment of the carriers in the Western District, in road and equipment, materials, supplies and cash, as of the beginning of each year, their net railway operating income and the rate of return on such investment for the years 1926, 1927, 1928, 1929 and 1930, are as follows:

Year	Investment in road and equipment and materials, supplies and cash as of January 1st	Net Railway Operating Income	Rate of Return
1926	$10,739,770,000	$469,070,972	4.37
1927	10,958,377,000	419,662,490	3.83
1928	11,149,012,000	475,572,474	4.27
1929	11,277,844,000	502,882,323	4.46
1930	11,552,838,000	358,607,945*	3.10

The above table is exclusive (*a*) of net additions to property account made in 1930; (*b*) of the effect upon net

*Net Railway Operating Income for 1930 is made up of the actual figures for Class I and Large Switching and Terminal Companies to which has been added $10,330,288, being the Net Railway Operating Income for 1929 of Class II, III, and Small Switching and Terminal Companies as shown in the "Statistics of Railways In The United States" for 1929. The Net Railway Operating Income of these carriers for 1930 is not available, but is not greater than that for 1929.

railway operating income of the reduction therein due to reduction in the volume of traffic since December 31, 1930; and (*c*) of the effect upon said net railway operating income of the reductions which will be caused by the order herein if the same becomes effective.

The true aggregate value for rate-making purposes of the property held for and used in the service of transportation by the carriers in the Western District, determined according to the law of the land as required by Section 15a of the Interstate Commerce Act, was, for the respective years, not less than the investment in said property as shown in the foregoing table, and is now not less than the investment in said property as shown in said table as of January 1, 1930.

4. (*a*) The net railway operating income of 1930, low and inadequate as it was, was attained only through a drastic retrenchment in the expenses of operation, including sweeping reductions in expenditures for maintenance. The expenditures for maintenance of way and structures and for maintenance of equipment by Class I carriers and large switching and terminal companies in the Western District for the first eleven months of the years 1926 to 1930, both inclusive, were as follows:

11 Months	Maintenance of Way and Structures	Maintenance of Equipment	Total
1926	$309,168,262	$400,533,014	$709,701,276
1927	324,300,294	390,844,760	715,145,054
1928	323,568,724	383,985,564	707,554,288
1929	326,887,954	387,752,928	714,640,882
Average 1926-29	320,981,308	390,779,067	711,760,375
1930	268,373,880	338,050,309	606,424,189

The aggregate maintenance expenditures in the year 1930 were 15.14% below those of 1929 and 14.80% below the average of such expenditures for the preceding four-year period.

(*b*) A direct result of the decline in revenue and the enforced retrenchment program of these respondents has been seriously to increase unemployment throughout the Western District as is set forth in the following table:

NUMBER OF RAILROAD EMPLOYES—WESTERN DISTRICT

	1929	1930	Decrease
January	592,250	579,804	12,446
February	596,925	572,103	24,822
March	608,910	577,738	31,172
April	634,268	595,479	38,789
May	657,694	614,695	42,999
June	670,034	595,223	74,811
July	672,989	584,938	88,051
August	679,314	573,669	105,645
September	673,305	559,874	113,431
October	666,282	538,036	128,246
November	637,092	508,664	128,428

5. Another change in conditions which makes it impossible for the Western District carriers to absorb large reductions in their rates and revenues on the grain traffic, which continues to be transported by railroad, is that a large volume of other traffic has been diverted to other transportation agencies through no fault of said carriers. These other transportation agencies are motor buses and motor trucks operating on the highways; boats and barges operating through the Panama Canal and on

inland waterways; and pipe lines constructed for the transportation of natural gas, crude oil and gasoline. The traffic so diverted has greatly increased in volume since the record in this proceeding was closed. Upon a rehearing, petitioners will show the extent of such diversion of traffic, its effect upon the maintenance of an adequate system of transportation by railroad, and the necessity of preserving the revenue of these respondents under present conditions without diminution through drastic rate reductions of a general nature.

In its said special report to the Senate Committee on Interstate and Foreign Commerce, dated January 21, 1931, the Commission said:

> "* * * The railroads have never been able, since 1920, to obtain the aggregate earnings contemplated by section 15a, and they are faced with continually increasing competition from other forms of transportation. * * *"

Said statement is peculiarly applicable to the carriers in the Western District.

Passenger revenue of the Class I carriers in the Western District in 1920 amounted to $526,091,040. In 1927 it had declined to $325,304,179. In the year 1929 it declined to $286,433,114. For the first eleven months of 1930, it showed a further decline to $214,041,593.

In its annual report to Congress for 1930 the Commission, commenting on the serious effect of motor competition on the past, present and future revenues of the railroads, stated that the passenger revenues of the carriers as a whole in 1929 were over $414,000,000 less than in 1920. As appears from the foregoing, approximately

$240,000,000 of said loss, or 57.97%, fell upon the carriers in the Western District, although the passenger revenue of said carriers in 1920 was but 40.89% of the total, by reason whereof it appears that the gross and net revenues of said carriers have been more seriously and alarmingly affected by motor competition than those of the carriers as a whole. At the time of said report to Congress for 1930, the passenger revenues of the carriers for that year were not available. As appears from the tables hereinbefore set forth, passenger revenues of the carriers in the Western District for the first eleven months of 1930 were over $49,000,000 less than in the corresponding months of 1929. In other words, the conditions which caused the Commission in its annual report to Congress to view with alarm the adverse effect of motor competition upon the passenger revenues of the carriers have grown steadily worse since the close of the hearing herein, since the denial of the former petitions for rehearing herein, and are materially worse than the conditions disclosed by the figures available to the Commission and commented upon by it in its annual report of 1930.

Meanwhile, there has been a large increase in the number of privately operated automobiles, the state registration of such automobiles in the Western District increasing from 9,335,134 in 1927 to 10,615,398 in 1930. In the Western District, in 1920, there were state registrations of 391,400 motor trucks; in 1923 there were 625,194; in 1927 there were 1,234,567; in 1928 there were 1,333,848; and in 1930 there were 1,583,190. Likewise, there has been an increase in motor bus service

for passenger transportation. Complete data are not now available separately for the Western District, but for the United States the following table sets forth the important facts:

GROWTH OF MOTOR BUS OPERATION AS OF JANUARY FIRST

	1927	1929	1930
Buses Operated	80,000	90,500	92,500
Operating Companies	21,900	23,600	23,900
Miles of Route	568,900	719,500	782,500
Passengers Carried	1,363,000,000	1,683,000,000	1,855,000,000

The nature of this competition so far as it affects Western District railroads is disclosed by the fact that, as to one important western carrier operating approximately 10,000 miles of line throughout large sections of the West[1], 35 competitive motor bus companies operate over 11,205 miles in the same territory served by the carrier and 358 regularly operated motor truck lines operate over 36,840 miles in competitive territory. On a subsidiary of the same rail carrier operating 700 miles of line[2], the entire line is paralleled by competing motor bus and truck service.

An increasing variety of freight is being diverted to the highways. Trucking of cotton in the Southwest has shown a large increase. Short-haul livestock traffic is handled by trucks in increasing volume as evidenced by the fact that in 1929 at Omaha, Nebraska, 43.4 per cent. of the hogs reached that market in trucks, at St. Joseph, Missouri, 52.6 per cent., and at Sioux City, Iowa, 64.5 per cent. By the use of automobile truck and trailer,

[1]Chicago, Burlington & Quincy Railroad Company.
[2]Fort Worth & Denver City Railway Company.

524

there is a growing movement of new automobiles from Detroit, Michigan, and South Bend, Indiana, to destinations on the Missouri River. The radius of operation of motor trucks is being continuously extended and trucks of increased tonnage capacity are supplanting the smaller type. At the time the record in this case was closed, it was the general impression that trucks were not serious competitors of railroads except on L. C. L. traffic moving within a limited radius. It has since been demonstrated that trucks now transport large quantities of articles usually moving in carload lots, such as coal, sand and gravel, cotton, fruits and vegetables, etc.; and that some freight is hauled by truck for distances of seven or eight hundred miles or more.

The decline in tons of less than carload freight carried by railroad is in part attributable to the increased business of forwarding companies which combine the freight of a number of shippers into single carload lots, but is largely due to truck competition. The rapidity of this decline is disclosed by the following table:

TONS LESS THAN CARLOAD FREIGHT CARRIED—WESTERN DISTRICT

Year	Tons Carried
1916	26,115,830
1917	26,523,906
1918	25,569,512
1919	25,831,244
1920	25,934,326
1921	18,908,594
1922	19,244,769
1923	19,825,973
1924	18,929,743
1925	18,870,830

Year	Tons Carried
1926	18,717,991
1927	18,047,0.7
1928	17,431,137
1929	17,298,619
1930	15,321,824*

The average of less than carload freight carried for the five years 1916 to 1920 was 25,994,964 tons. In the year 1930 there was a reduction of 10,673,140 tons below this average. The revenue effect of this loss of tonnage may be obtained by multiplying such reduction in tons by $10.344, that being the amount received per ton of less than carload freight by Western District carriers for the first six months of 1930. The total loss of revenue in the year 1930 disclosed by this computation is $110,402,960.

Not only has there been a diversion of traffic to the highways, but there has been an increase in the tonnage transported by the Inland Waterways Corporation and in tonnage transported through the Panama Canal, all of which formerly moved by railroad.

The annual reports of the Inland Waterways Corporation show tonnage transported on the lower and upper Mississippi divisions as follows:

TONNAGE ON MISSISSIPPI DIVISIONS

Year	Tons
1918	23,378
1919	104,769
1920	160,702
1921	443,267

*1930 estimated on the basis of six months' figures projected for the year on relationship of first six months of 1929 to the total for the year.

Year	Tons
1922	599,669
1923	710,431
1924	849,503
1925	910,755
1926	1,045,627
1927	1,251,513
1928	1,555,208
1929	1,398,826

In addition there has been a growth of independent operators of fleets on the inland waterways whose tonnage figures are not available.

Growth in waterborne traffic through the Panama Canal, with an increasing loss of tonnage to the rail carriers, is shown in the following table:

CARGO PASSING THROUGH PANAMA CANAL

BETWEEN EAST COAST AND WEST COAST OF U. S. IN LONG TONS

Year	Atlantic to Pacific	Pacific to Atlantic	Total Coast to Coast Tonnage
1928	2,576,399	7,657,300	10,233,699
1929	3,184,141	6,992,632	10,176,773
1930	3,161,530	7,328,535	10,490,065

Since the record in this proceeding was closed, there has been an extensive building of pipe lines for the transportation of crude oil and gasoline. At the time this record was closed, the transportation of gasoline by pipe line was generally considered impracticable and, at best, was in an experimental stage. Some of these pipe lines are now under construction. In addition, there has been an extensive building of pipe lines for the transportation of natural gas. Until recently, pipe lines for

the transportation of natural gas in the Western District were largely confined to the States of Texas, Oklahoma, Arkansas, southeastern Kansas and southern California. Within the past four years, there has been an extensive further construction in these states, and in addition pipe lines for the transportation of natural gas have been extended from the Mid-Continent field to St. Louis, Kansas City, St. Joseph, Missouri, to Omaha, Lincoln and Superior, Nebraska, to Pueblo, Colorado Springs, Denver and Boulder, Colorado, and intermediate territory. There is also now either under construction or in prospect of early development further extension of pipe lines for the distribution of natural gas from the Mid-Continent field to Des Moines, Iowa, Minneapolis, Minnesota, and Chicago, Illinois. Data are not presently available as to the extent of use of natural gas transported in this manner, but in many territories the use of coal has been thereby supplanted not only for domestic consumption, but also for industrial uses. The Oil and Gas Journal is authority for the statement that there are now approximately 60,000 miles of natural gas pipe lines in the United States and that a large additional mileage is in prospect of early construction. Not only is there construction of pipe lines for natural gas from the Mid-Continent field, but natural gas from other fields has recently been piped into Salt Lake City, Utah, San Francisco, California, and other points in Wyoming, Montana, North Dakota and South Dakota.

6. In its Annual Report to Congress for the year 1930 the Commission said:

> "* * * the prospect of a continued expansion in freight business to offset the further loss in passenger business is darkened by the competition of water lines, pipe lines, and trucks, and by changes that may check the growth in demand for ton-mileage, such as economy in the use of coal, changes in the location of industry, and the relatively slower growth of population."

As hereinbefore set forth, the adverse effects of the competition described have been, and are continuing to be, experienced by the carriers in the Western District in common with the carriers as a whole and have been increasingly present since the close of the record herein and may, by reason of the facts hereinbefore stated, be fairly anticipated to become more pronounced during the current year and for the future. The number of cars of revenue freight loaded in the years 1927 and 1930, respectively, classified according to commodities classification of the American Railway Association was as follows:

	1927	1930
Grain and Grain Products	1,577,792	1,576,091
Live Stock	1,176,379	1,004,673
Coal	1,305,818	1,152,142
Coke	99,747	89,458
Forest Products	1,828,573	1,276,518
Ore	1,256,619	1,121,397
Merchandise	4,372,560	4,018,041
Miscellaneous	6,972,635	6,759,086
Total	18,590,123	16,997,406

The traffic in grain and grain products, to which the reductions herein apply, is the only class of traffic so reported by the American Railway Association in the Western District which has not declined since the close of the record herein. Moreover, it is the traffic least affected by motor truck competition. The effect of the order of the Commission, therefore, is materially to reduce the revenues of said carriers on the only traffic which, since the close of the hearing herein, has continued to move and may be anticipated to continue to move in the same volume as before and the movement of which will be in no wise increased by the required reduction in the rates thereon. The reduction will not and cannot stimulate the movement of these commodities, as such movement is determined by production and demand and does not vary with changes in transportation charges and said reduction will not and can not promote freedom of movement of said commodities.

7. Since the close of the record herein, the changes in conditions have been such as seriously to impair the credit and adversely to affect the marketability of securities of the carriers in the Western District. Not only has the market price of their common and preferred stock declined to such a level that it is impossible for them to secure additional capital or to refinance through the sale of stock, but, in addition, their bond issues have, in many instances, ceased to command the credit which they formerly enjoyed. In states which have statutory requirements in respect to the earnings of railroad companies as a condition precedent to the legal investment in the bonds of railroad companies by savings banks, the decline in rail-

road earnings has been such as to jeopardize the eligibility of these bonds, in many instances, for savings banks investment. Under the law of New York as it formerly existed, almost $500,000,000 of bonds of carriers in the Western District were stricken from the approved list for savings banks investment during the period between 1917 and 1928, whereas only $6,000,000 of bonds of other carriers were so stricken during the same period. The New York statute was amended effective April 12, 1928, so as thereafter to require that railroad companies should earn at least one and one-half times their interest charges before their bonds could be eligible for savings banks investment. In the year 1930, the earnings of many large and important carriers throughout the Western District were so reduced as barely, if at all, to comply with this requirement. Upon a rehearing, petitioners will offer evidence concerning these facts and will show that their present earnings are such that, if a further reduction of substantial proportions in their income be required, large additional amounts of their bonds will cease to be eligible for savings banks investment in New York and other important states.

Petitioners will also show that during the period since the record herein was closed there has been a large decline in the holdings of the securities of these petitioners by life insurance companies and by savings banks which have heretofore been large investors in this type of securities.

8. Prior to the war, stockholders of Western railroads received relatively greater dividend payments than in other sections of the United States. Since the war, this

situation has been reversed, as shown by the following table from Statistics of Railways for the years 1917 and 1929, the latest year for which data have been published.

RATIO OF DIVIDENDS PAID TO ALL STOCK OUTSTANDING
(CLASS I RAILROADS)

	1917	1929
Eastern District	3.95%	6.91%
Southern District	3.90	6.92
Western District	4.93	4.88

Total dividend payments in the East and South have greatly increased in both amount and percentage, while in the West the slight increase in the amount of dividend payments has not kept pace with the increase in stock outstanding. This fact is evidenced by the above decline in the rate paid on all stock outstanding. Total dividend declarations for the years 1917 and 1929 and the percentage of increase thereof, as between the two years, are set forth in the following table:

TOTAL DIVIDENDS DECLARED
(CLASS I RAILROADS)

	1917	1929	Per Cent. Increase
Eastern District	$107,011,295	$222,837,893	108.24%
Southern District	40,272,506	85,598,478	112.55
Western District	173,111,978	181,689,302	4.95

More striking, as shown by the table below, is the fact that railroads in other sections have been able to increase greatly their dividend payments out of current income (as contrasted with surplus), while dividend payments out of current income have declined in the West.

DIVIDENDS DECLARED FROM CURRENT INCOME

(CLASS I RAILROADS)

	1917	1929	Per Cent. Increase
Eastern District	$ 81,253,432	$128,387,266	58.01%
Southern District	3,640,080	10,721,502	194.54
Western District	135,928,861	122,192,062	Decr. 10.11

9. Shortly before the beginning of the year 1930, Western District carriers, together with other carriers in the United States, were requested by high public authority to undertake, in so far as it was possible so to do, such constructive programs as would assist in alleviating the depressed condition of industry and the threatened increase of unemployment. In response to this request and in an effort to achieve the desired result, petitioners laid out specific programs calling for large capital expenditures, and submitted same to the President of the United States, in December, 1929. These programs provided for capital expenditures during the year 1930 in the total amount of $365,000,000. Of this, $148,000,000 was to be expended for equipment and $217,000,000 for roadway structures. These appropriations exceeded by $43,725,000 the expenditures of the previous year.

Despite the serious reductions in gross and net revenue, said carriers faithfully adhered to said program and during the first nine months of 1930, expended in accordance therewith, $276,170,000, exceeding by $2,420,000 an amount equivalent to three-fourths of the estimated program for the year.

10. Said order of the Commission, if it shall become effective, will, under the conditions now present, threaten

the maintenance of an adequate system of transportation and impair the ability of the carriers in the Western District to provide the same.

In the report herein (p. 698) it is said:

> "We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation. We say this especially in the light of increased revenues already granted in certain other cases, and in the realization that a failure of the present revision to afford adequate revenue will prompt further proceedings."

No case granting any such increased revenues is described or referred to in the record herein, and upon rehearing petitioners will show that their revenues have not been increased by reason of rate adjustments already granted in certain other cases; and that since said record was closed these petitioners have not received increased revenue in any substantial amount as the result of any decision of the Commission thereafter rendered.

Petitioners will also show that, in a proceeding entitled *Western Trunk Line Class Rates,* 164 I. C. C. 1, decided May 6, 1930, in which the effective date, as postponed, is April 1st, 1931, the Commission found that carriers in the Western District were not earning a fair return; that additional revenue was required for the maintenance of adequate transportation; and that certain increases in the class rates of the Western Trunk Line carriers (such carriers comprise only a part of the carriers in the Western District), which the Commission therein found were necessary, "will not augment the earnings sufficiently to produce a fair return upon the carriers' property in the Western Group as a whole".

Petitioners will show that, at the time said decision was made the Commission issued a public notice in which it estimated that increased rates authorized by the decision would produce additional revenue of from $10,000,000 to $12,000,000 a year. Petitioners deny that the effect of said decision will be such as to produce additional revenue in these amounts, but, on the contrary, will show (if given an opportunity so to do) that, by reason of the drastic reductions required in the long haul rates and the continued increase in the use of automobile trucks for short haul transportation, any increased revenues which may accrue by reason of the rates authorized in said decision will be far less than said estimated amounts. Further, petitioners will show that such increases in revenue are contingent upon the approval of the several state commissions of increased rates on intrastate traffic; that thus far only one state commission has authorized such increased rates; and that in some of the other states active opposition is being encountered. In fact, increased revenue in any amount, by reason of said decision, is wholly problematical and speculative and at all events will fall far short of the estimates aforesaid. By reason of the foregoing facts, petitioners will further show that they, not only will fail to receive any part of the increased revenue of which the Commission has heretofore found them to be in urgent need, but that the reductions required by the order herein are wholly inconsistent with such finding; and that, if the order herein shall become effective, it will reduce the revenues of these petitioners far below the level which the Commission in *Western Trunk Line Class Rates, supra,* found to be wholly inadequate.

Petitioners will further show upon rehearing that the facts relating to the present conditions of carriers in the Western District are such as should now prompt further proceedings herein so that the grain rates will afford adequate revenue to these petitioners.

WHEREFORE, petitioners pray that the order herein be vacated and set aside, or that its effective date be postponed, that a rehearing and reconsideration of the same be granted and that the proceedings herein be re-opened for the taking of further evidence.

Dated, February 18, 1931.

Respectfully submitted,

WALTER McFARLAND,
ELMER A. SMITH,
P. F. GAULT,
DOUGLAS F. SMITH,
H. H. LARIMORE,
J. N. DAVIS,
A. B. MASON,
R. J. HAGMAN,
M. L. COUNTRYMAN, JR.,
R. S. OUTLAW,
A. B. ENOCH,
Their Attorneys.

Room 1025, La Salle Street Station,
Chicago, Illinois.

FREDERICK H. WOOD,
KENNETH F. BURGESS,
WILLIAM D. WHITNEY,
Of Counsel.

[fols. 558 & 559] IN UNITED STATES DISTRICT COURT

No. 10479

[Title omitted]

ORDER SETTING CAUSE, ETC.—April 29, 1931

It appearing that petitioners have this day filed their petition in the above proceeding seeking to have annulled and set aside a certain order of the Interstate Commerce Commission therein described and praying for an interlocutory injunction,

It is ordered by the court that said application for an interlocutory injunction in the above-entitled cause be and it is hereby set for hearing May 6, 1931, and Honorable William M. Sparks, United States Circuit Judge, 7th Circuit, and Honorable George A. Carpenter, United States District Judge for the Northern District of Illinois, are called to the assistance of the judge of this court to hear and determine said application.

Charles E. Woodward, Judge.

[fol. 560] IN UNITED STATES DISTRICT COURT

In Equity. No. 10479

[Title omitted]

ACKNOWLEDGMENT OF SERVICE—Filed May 6, 1931

Service of a copy of the petition and attached exhibits in the above-entitled cause is hereby accepted and acknowledged this 30th day of April, 1931.

John Lord O'Brien, The Assistant to the Attorney General for the United States of America. Daniel W. Knowlton, Edward M. Reidy, H. L. Underwood, for the Interstate Commerce Commission.

[fol. 561] IN UNITED STATES DISTRICT COURT

In Equity. No. 10479

[Title omitted]

NOTICE OF APPLICATION FOR INJUNCTION—Filed May 6, 1931

SIRS: Please take notice that application having been presented in the above entitled cause to the Honorable Charles Edgar Woodward, United States District Judge for the Northern District of Illinois, upon the petition filed herein on the 29th day of April, 1931, verified on the 29th day of April, 1931, copy whereof is annexed hereto, for a temporary or interlocutory injunction herein, restraining, enjoining and suspending, during the pendency of this cause, or until the further order of the Court, the effect and enforcement of a certain order of the Interstate Commerce Commission entered on July 1, 1930, in a proceeding entitled No. 17000, Rate Structure Investigation, Part VII—Grain and Grain Products Within Western District and for Export, as amended by a supplemental order therein, dated April 10, 1931; and the judge, to whom said application was presented, having called to his assistance the Honorable William M. Sparks, United States Circuit Judge, Seventh Circuit, and the Honorable George A. Carpenter, United States District Judge for the Northern District of Illinois; and the said application having been set by the Court for hearing on the 6th day of May, 1931, at 10:00 A. M., Chicago Daylight Saving Time.

[fols. 562 & 563] The said application will be presented by the undersigned on behalf of the petitioners herein to the Court and to the Honorable William M. Sparks, United States Circuit Judge, Seventh Circuit, the Honorable Charles Edgar Woodward, and the Honorable George A. Carpenter, United States District Judges for the Northern District of Illinois, as Judges thereof, or to such Judges as may be substituted therefor, for hearing and determination at the Court room customarily occupied by the Honorable Charles Edgar Woodward in the Federal Building in the City of Chicago, in the County of Cook, and in the State of Illinois, within said Northern District of Illinois, Eastern Division, on the date and hour named above, or as soon thereafter as counsel can be heard, and for the grant-

ing of such other and further relief in the premises as may be just and as the circumstances may require.

Yours, etc., Frederick H. Wood, Walter MacFarland, Elmer A. Smith, P. F. Gault, Douglas F. Smith, H. H. Larimore, J. N. Davis, A. B. Mason, R. J. Hagman, M. I. Countryman, Jr., R. S. Outlaw, Leslie Craven, Wm. D. Whitney, A. B. Enoch, Solicitors for Petitioners, Room 1025, La Salle Street Station, Chicago, Illinois.

To the Interstate Commerce Commission, Washington, D. C.; the Honorable William D. Mitchell, Attorney General of the United States, Washington, D. C.

Service accepted this 30 day of April, 1931.

For the United States of America: The Attorney General, by John Lord O'Brien, The Assistant to the Attorney General. Daniel W. Knowlton, Chief Counsel Interstate Commerce Commission. Edward M. Reidy, H. L. Underwood.

[fols. 564 & 565] IN UNITED STATES DISTRICT COURT

In Equity. No. 10479

[Title omitted]

ORDER SETTING CAUSE, ETC.—May 4, 1931

It appearing that an order heretofore was entered in the above-entitled proceeding setting for hearing May 6, 1931, the application by petitioners for an interlocutory injunction, and calling Honorable William M. Sparks and Honorable George A. Carpenter to the assistance of the Judge of this Court to hear and determine said application, and

It further appearing that Honorable George A. Carpenter will be unable to sit as one of the two other Judges at said hearing on the said application,

It is ordered by the Court that the said application be and it is hereby set for hearing at 10 A. M. Chicago time on the day heretofore ordered, and Honorable William M. Sparks, United States Circuit Judge, 7th Circuit, and Honorable Walter C. Lindley, United States District Judge

for the Eastern District of Illinois, are called to the assistance of the Judge of this Court to hear and determine the said application.

Charles E. Woodward, District Judge.

Dated May 4, 1931.

[fol. 566] IN UNITED STATES DISTRICT COURT

In Equity. No. 10479

[Title omitted]

PETITION FOR LEAVE TO INTERVENE—Filed May 7, 1931

Now come The Baltimore & Ohio Railroad Company; The Central Railroad Company of New Jersey; Boston and Maine Railroad; The Delaware and Hudson Railroad; The Delaware Lackawanna & Western Railroad Company; Erie Railroad Company; Grand Trunk Western Railroad Company; Lehigh Valley Railroad; The New York Central Railroad Company, for itself and as lessee of the Boston & Albany Railroad, Cleveland, Cincinnati, Chicago & St. Louis Railway and Michigan Central Railroad; The New York, Chicago and St. Louis Railroad Company; The New York, New Haven and Hartford Railroad Company; The Pennsylvania Railroad Company, and Pere Marquette Railway Company, in behalf of themselves and of other common carriers by railroad in the Eastern District, which may be defined as the territory lying east of the Mississippi River and north of the Ohio and Potomac rivers, and respectfully represent unto your Honors that they are engaged as common carriers in the transportation within the said eastern district of grain and grain products, which originate on the lines of the petitioners in the Western District and are destined to Atlantic ports for export, and as [fol. 567] such common carriers are subject to the provisions of the Interstate Commerce Act.

I

That your petitioner, The Baltimore & Ohio Railroad Company, is a corporation of the State of Maryland, with its principal office at Baltimore, Maryland; that your peti-

tioner, The Central Railroad Company of New Jersey, is a corporation of the State of New York, with its principal office at New York, New York; that your petitioner, Boston and Maine Railroad, is a corporation of the State of Massachusetts, with its principal office at Boston, Massachusetts; that your petitioner, The Delaware & Hudson Railroad, is a corporation of the State of New York, with its principal office at New York, New York; that your petitioner, the Delaware Lackawanna & Western Railroad Company, is a corporation of the State of New York, with its principal office at New York, New York; that your petitioner, Erie Railroad Company, is a corporation of the State of New York, with its principal office at New York, New York; that your petitioner, Grand Trunk Western Railroad Company, is a corporation of the State of Michigan, with its principal office at Detroit, Michigan; that your petitioner, Lehigh Valley Railroad Company, is a corporation of the State of Pennsylvania, with its principal office at Philadelphia, Pennsylvania; that your petitioner, The New York Central Railroad Company, is a corporation of the States of New York, Pennsylvania, Ohio, Indiana, Michigan and Illinois, with its principal office at New York, New York; that your petitioner, The New York, Chicago and St. Louis Railroad Company, is a corporation of the States of New York, Pennsylvania, Ohio, Indiana and Illinois, with its principal office at Cleveland, Ohio; that your petitioner, The New [fol. 568] York, New Haven and Hartford Railroad Company, is a corporation of the State of Connecticut, with its principal office at New Haven, Connecticut; that your petitioner, The Pennsylvania Railroad Company, is a corporation of the State of Pennsylvania, with its principal office at Philadelphia, Pennsylvania; that your petitioner, Pere Marquette Railway Company, is a corporation of the State of Michigan, with its principal office at Detroit, Michigan; that all of your petitioners are now and have been in possession of and operating railroads engaged in interstate commerce and subject to the Interstate Commerce Act.

II

That this proceeding is a suit to enjoin, suspend, set aside and annul a certain order entered by the Interstate Commerce Commission in a proceeding before it entitled, "Rate Structure Investigation, Part VII, Grain and Grain

Products Within Western District and for Export", being Docket No. 17,000, Part 7 thereof; that your petitioners are and were at all times during the pendency of said proceeding before the said Interstate Commerce Commission, parties in interest thereto within the meaning of the statutes of the United States; that they participated in said proceeding before the Interstate Commerce Commission, introducing evidence, cross examining witneses, filing briefs and orally arguing the same and that your petitioners are entitled by law to intervene in this cause.

III

That your petitioners cannot adequately protect their rights and interests unless permitted to intervene and join in the petition to enjoin, suspend, set aside and annul the said order of the Interstate Commerce Commission, and that unless said rights and interests are protected, your [fols. 569 & 570] petitioners will suffer great and irreparable damage and injury.

Wherefore your petitioners pray that an order may be entered permitting them to intervene in this cause and to be made parties thereto with like effect as if these interveners had been named parties petitioners to said original petition and bill for injunction on file herein.

The Baltimore & Ohio Railroad Company, The Central Railroad Company of New Jersey, Boston and Maine Railroad, The Delaware & Hudson Railroad, The Delaware Lackawanna & Western Railroad Company, Erie Railroad Company, Grand Trunk Western Railroad Company, Lehigh Valley Railroad, The New York Central Railroad Company, The New York, Chicago & St. Louis Railroad Company, The New York, New Haven and Hartford Railroad Company, The Pennsylvania Railroad Company, and Pere Marquette Railway Company. (Signed) James Stillwell, Theodore Schmidt, M. B. Pierce, H. I. Horr, W. J. Stevenson, J. R. Connell, D. P. Connell, Attorneys for Above-named Petitioners.

[fol. 571] IN UNITED STATES DISTRICT COURT

10479

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE—May 7, 1931

This cause coming on to be heard upon petition of The Baltimore & Ohio Railroad Company; The Central Railroad Company of New Jersey; Boston and Maine Railroad; The Delaware and Hudson Railroad; The Delaware, Lakawanna & Western Railroad Company; Erie Railroad Company; Grand Trunk Western Railroad Company; Lehigh Valley Railroad; The New York Central Railroad Company, for itself and as lessee of the Boston & Albany Railroad, Cleveland, Cincinnati, Chicago and St. Louis Railway and Michigan Central Railroad; The New York, Chicago and St. Louis Railroad Company; The New York, New Haven and Hartford Railroad Company; The Pennsylvania Railroad Company, and Pere Marquette Railway Company, for leave to intervene herein as parties petitioners; and the Court having heard the argument of counsel and being fully advised in the premises;

It is hereby ordered that The Baltimore & Ohio Railroad Company; The Central Railroad Company of New Jersey; Boston and Maine Railroad; The Delaware and Hudson Railroad; The Delaware Lackawanna & Western Railroad Company; Erie Railroad Company; Grand Trunk Western Railroad Company; Lehigh Valley Railroad; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The New York, New [fols. 572 & 573] Haven and Hartford Railroad Company; The Pennsylvania Railroad Company, and Pere Marquette Railway Company, be and they are hereby permitted to intervene in said cause as parties petitioners.

Charles E. Woodward, Judge.

Dated May 7th, 1931.

[fols. 574-577] IN UNITED STATES DISTRICT COURT

In Equity. No. 10479

[Title omitted]

PETITION OF CORPORATION COMMISSION OF ARIZONA ET AL. FOR LEAVE TO INTERVENE—Filed May 7, 1931

To the Honorable Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division:

Respectfully represent Corporation Commission of Arizona, Public Utilities Commission of the State of Colorado, Public Utilities Commission of the State of Idaho, Public Service Commission of the State of Kansas, Public Service Commission of Missouri, Board of Railroad Commissioners of the State of Montana, Public Service Commission of Nevada, New Mexico State Corporation Commission, Board of Railroad Commissioners of North Dakota, Corporation Commission of Oklahoma, Public Utility Commissioner of Oregon, which is the successor by law of the [fol. 578] Public Service Commission of Oregon, and Board of Railroad Commissioners of the State of South Dakota, as follows:

I

That each of said commissions or boards is a public corporation and administrative tribunal. That under the laws of the state by which it was created it is the duty of each of said petitioners, within the state in which it was created, to regulate the rates of all common carriers by railroad, applicable to the movement of intrastate traffic within such state, and, proceeding in the manner prescribed by such laws, to fix and establish such rates upon a just, reasonable and lawful basis.

II

That in the performance of their duty aforesaid the said petitioners are subject to the limitations imposed upon state action by the Constitution of the United States and by the Acts of Congress made thereunder, and by orders of the Interstate Commerce Commission made in conformity with valid Acts of Congress.

III

That Sections 3 and 13 (4) of the Interstate Commerce Act forbid and make unlawful every form of undue, unreasonable or unjust discrimination against persons or places engaged in interstate commerce, or against interstate or foreign commerce itself, the effect of which pro-
[fol. 579] visions, as construed by the United States Supreme Court, is to make unlawful the establishment of intrastate rates of any carrier subject to the Interstate Commerce Act, even though prescribed by state authority, which, when compared with interstate rates lawfully in effect, are so low as to subject interstate shippers to undue and unreasonable disadvantage, as compared with intrastate shippers, or which are unduly discriminatory as against interstate commerce, by reason of their adverse effect upon the revenues of such carriers.

IV

That in consequence of the provisions of federal law aforesaid, said petitioners, in the exercise of the powers conferred upon them by the laws of their respective states, are to a large extent limited and controlled by the level of interstate rates lawfully in effect at any time, and intrastate rates which are just and reasonable when considered by themselves may be unlawful solely by reason of their relationship to interstate rates which have been fixed upon a higher level.

V

That it is the duty of each of said petitioners to take every proper action within its powers which will promote and facilitate the establishment of just and reasonable interstate rates, or which will tend to prevent the establishment of interstate rates which are unjust and unreasonable, to the end that the power of the petitioners to establish just and reasonable intrastate rates may not be
[fol. 580] hampered, diminished or destroyed, and to the further end that the citizens of their respective states, and carriers operating therein, may enjoy the benefit of such rates.

VI

That the interstate rates on grain and grain products in the states aforesaid bear an important relationship to

rates on the same commodities moving in intrastate commerce within said states; and that the levels of interstate rates which shall be maintained will limit and in large measure control each and every petitioner in the fixing of intrastate rates upon the same commodities.

VII

That Section 13(3) of the Interstate Commerce Act expressly authorizes the Interstate Commerce Commission to hold joint hearings with state regulating bodies on any matters wherein the Interstate Commerce Commission is empowered to act, and where the rate making authority of a state may be affected by the action taken by the Commission. Said section also expressly authorizes the Commission to avail itself of the cooperation, services, records and facilities of such state authorities.

VIII

That in pursuance of the purpose of this provision the Interstate Commerce Commission and the state regulating commissions having jurisdiction over railroad rates, on May 2, 1922, adopted and promulgated the so-called [fol. 581] cooperative plan, designed to coordinate the exercise of the powers granted respectively to the federal commission and to the state commissions, which said plan was reported to Congress in its original form in the Commission's annual report December 1, 1922, and again, as afterwards amended, in its annual report December 1, 1925.

IX

That in the proceeding in which the order was made which is under attack in this proceeding, it was recognized by the Interstate Commerce Commission that the action which might be taken by said Commission might affect the rate making authority of the aforesaid states; and said Interstate Commerce Commission invited each of the petitioners to cooperate with it in said investigation, and in the hearings held therein.

X

That said petitioners accepted such invitation, and were represented in said investigation, and in hearings therein,

by commissioners duly designated for that purpose, which participation involved the expenditure of much time and labor by the members of said petitioning commissions, and imposed substantial expense upon said commissions.

XI

That said order of the Interstate Commerce Commission prescribes interstate rates which are not lower than are just and reasonable; and that the setting aside of said [fol. 582] order, and the establishment of interstate rates upon a level or levels higher than those prescribed therein will operate to establish unjust and unreasonable interstate rate standards, and thereby the petitioners aforesaid, in the performance of their duties aforesaid, may be prevented from establishing just and reasonable rates applicable to the movement of interstate traffic.

XII

That all of said petitioners had the right to appear as parties to the proceeding in which said order of the Interstate Commerce Commission was made; that certain of said petitioners did appear therein, for the purpose of enabling members of their respective staffs to introduce into the record cost studies and other informing data which might be helpful in the consideration and determination of the issues before the Commission in said proceeding; and that, under the rules of said Interstate Commerce Commission, said petitioners so appearing became and were parties to said proceeding.

XIII

That by reason of the facts which have been stated said petitioners are interested in this proceeding and in said order of the Interstate Commerce Commission, and desire to be admitted as intervening parties defendant herein, to the end that they may be heard by this court in defense of said order.

[fol. 583]

XIV

The petitioners file herewith their respective answers to the plaintiffs' bill.

Wherefore the petitioners pray that they may be permitted to intervene herein, that their answers may be filed, and that they may be heard as parties to this proceeding upon all issues presented for decision herein.

C. W. Steiger, Topeka, Kansas; D. D. McDonald, Jefferson City, Mo.; Francis Silver, Helena, Montana; James Morris, Bismarck, N. D.; Paul A. Walker, Oklahoma City, Okla.; Herman L. Bode, Pierre, S. D.; John E. Benton, 603-6 Otis Building, Washington, D. C., Solicitors for Intervening Petitioners.

[fols. 584-587] *Duly sworn to by John E. Benton. Jurat omitted in printing.*

[fols. 588 & 589] In United States District Court

No. 10479

[Title omitted]

Order Granting Leave to Intervene—May 7, 1931

On motion of solicitor for the petitioner Corporation Commission of Arizona it is ordered that leave be and the same is hereby given said petitioner to intervene in the above entitled cause.

[fols. 590 & 591] In United States District Court

In Equity. No. 10479

[Title omitted]

Petition for Leave to Intervene—Filed May 7, 1931

To the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division:

The Nebraska State Railway Commission is vested under the constitution and laws of the State of Nebraska with power to regulate the rates, fares, charges, practices and services of all common carriers, including all steam rail-

roads, within the State of Nebraska. It is authorized by law to appear and represent the State and the people thereof in proceedings before the Interstate Commerce Commission which involve or affect or may involve or affect Nebraska shippers either interstate or intrastate.

At the time the proceeding known as Interstate Commerce Commission Docket 17,000, Rate Structure Investigation Part VII, Grain and Grain Products within the Western District and for Export was instituted, the Nebraska State Railway Commission was notified as provided in the order of March 12, 1925, and thereafter was invited by the Interstate Commerce Commission to participate cooperatively in the hearings and consideration of said Part VII.

Thereafter the Nebraska State Railway Commission participated with the Interstate Commerce Commission therein. One of the members of the Nebraska Commission sat with the Interstate Commerce Commission in numerous hear- [fols. 592-594] ings in said proceeding and sat with the Commission at the argument and at consultations during the consideration of the proceeding after its submission.

The general effect of the decision of the Interstate Commerce Commission in said Part VII entered July 1, 1930, is to reduce numerous rates on Grain and Grain Products produced in Nebraska to many points of destination and in addition thereto said order grants relief from very numerous discriminations and inequalities in the grain rate structure and gives the producers of grain and grain products and shippers thereof of Nebraska much more equitable adjustment of grain rates interstate than has heretofore existed.

The Nebraska State Railway Commission therefore respectfully prays that it may interevene as a defendant in support of the order of the Interstate Commerce Commission of July 1, 1930, and participate in this cause as provided in United States Code, Title —, Sections —.

It has prepared an answer to the petition of complainants which answer is tendered herewith and which it asks leave to file.

C. A. Sorensen, Hugh La Master, Solicitors for Nebraska State Railway Commission, Capitol Building, Lincoln, Nebraska.

Duly sworn to by Hugh La Master. Jurat omitted in printing.

[fols. 595 & 596] IN UNITED STATES DISTRICT COURT

10479

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE—May 7, 1931

On motion of solicitors for the Nebraska State Railway Commission it is ordered that leave be and the same is hereby given the Nebraska State Railway Commission to intervene in the above entitled cause.

[fol. 597] IN UNITED STATES DISTRICT COURT

In Equity. No. 10479

[Title omitted]

APPLICATION FOR LEAVE TO FILE BILL IN INTERVENTION—Filed May 7, 1931

To the Honorable Judges of the District Court of the United States for the district and division above named:

Now come the Interveners above named and respectfully show unto your honors that said plaintiffs did, on the 30th day of April, 1931, file in this cause their bill wherein they seek a preliminary restraining order and a temporary or interlocutory injunction restraining, enjoining and suspending until the further order of this Court, the effect and enforcement of the order of the Interstate Commerce Commission, dated July 1, 1930, in those proceedings had in Docket No. 17000, Part 7, grain and grain products, as a part of the general rate structure investigation before the Interstate Commerce Commission.

That your petitioners claim an interest herein by reason of being parties in said Docket No. 17,000, Part 7, and by reason of being directly interested in the said order made by the said Interstate Commerce Commission as set forth in the Bill and Petition of your Interveners hereto attached.

Wherefore your Interveners pray for permission to file their Bill and Petition in Intervention as hereto attached,

and respectfully pray that the Bill of said Plaintiffs be in all respects disallowed and denied, and particularly, in any event, that said Plaintiffs' Bill be denied with respect to transit as ordered by said Interstate Commerce Commission in said Docket No. 17,000, Part 7, and particularly so with reference to the order of said Interstate Commerce Commission requiring the Northern Lines, namely, the Great Northern Railway Company and the Northern Pacific Railway Company, to cease and desist from making any separate charge for transit on said Northern Lines.

Harrison A. Bronson, Attorney for the State of North Dakota, Doing Business as the North Dakota Mill & Elevator Association and the North Dakota Terminal Exchange. Address: Grand Forks, No. Dak.

[fol. 598] IN UNITED STATES DISTRICT COURT

No. 10479

[Title omitted]

BILL AND PETITION OF STATE OF NORTH DAKOTA AND NORTH DAKOTA TERMINAL EXCHANGE FOR LEAVE TO FILE AND TO APPEAR IN INTERVENTION HEREIN

Now come the state of North Dakota, doing business as the North Dakota Mill and Elevator Association, pursuant to chapter 217 of the Laws of North Dakota for the year 1925, and the North Dakota Terminal Exchange, a private corporation, and respectfully represent, allege and make showing as follows:

I

That your petitioners herein were and are complainants in that proceeding known as Docket No. 19,842, instituted before the Interstate Commerce Commission, in which the plaintiffs above named, with other parties, were defendants.

II

That said Docket No. 19,842 involved, among other things, the issue of securing equalized transit privileges

upon grain and grain products while in course of transportation by the Great Northern Railroad and the Northern Pacific Railroad and other Railways, when routed to or through the North Dakota Terminal at Grand Forks, North Dakota, and invol-ed particularly the issue of removing prejudicial, discriminatory and unreasonable transit practices on the part of said carriers so named particularly, as affecting said North Dakota Terminal and particularly with reference to transit penalties or charges imposed and collected upon said named carrier lines as opposed to free transit privileges otherwise and in other places and territories granted.

[fol. 599] III

That pursuant to proceedings had and orders made by the Interstate Commerce Commission said Docket No. 19,842 was made a part of the general rate investigation known as Docket 17,000, part 7, covering grain and grain products and was investigated, the evidence therein taken, and hearing and consideration thereof had, in connection with and as part of said Docket No. 17,000, Part 7; and that the order made by said Commission in said Docket No. 17,000, Part 7, concerning transit and transit privileges, was a disposition of and a determination of the issues involved in said Docket No. 19,842.

IV

That in said Docket No. 17,000, Part 7, the said Interstate Commerce Commission, in its decision rendered July 1, 1930, found and ordered as follows (Page 654):

"The carriers transit rules should provide for (a) a maximum of two free stops in transit (plus one inspection) of grain for storage, conditioning, and milling into its direct products, additional stops to be paid for at the rate of 2 cents per hundred pounds for each stop other than for inspection; (b) reasonable limitation of out-of-line and competitive routes and back hauls; and (c) elimination of little-used and obsolete transit provisions that serve mainly as basis for unreasonable requests for transit and to bring censure upon transit tariffs generally. A stop at a primary market from which there are proportional rates will be viewed as any other transit stop."

"We find that present transit practices are unreasonable and unduly preferential and prejudicial to the extent they are not in harmony with the foregoing conclusions."

"The foregoing discussion has been of transit without separate charge, which prevails throughout the western district, except that on the lines of the Northern Pacific, Great Northern, Milwaukee west of about Mobridge, S. Dak., and Oregon-Washington Railroad & Navigation Company west of Huntington, Oreg., to Minneapolis and Duluth eastbound, and to North Pacific coast terminals westbound, a separate transit charge of from 1.5 to 2.5 cents is made. The charge here is apparently made because largely of a minimum of cross-country competition of north-and-south lines and a desire to encourage the movement of wheat rather than of flour."

[fol. 600] "We find that the making of a separate charge for transit on the northern lines named, or parts of those lines, and the granting of transit without separate charge on other lines in the western district, or on other parts of the northern lines, subjects the shippers subject to the separate charge to undue prejudice and disadvantage and gives to the shippers against whom no separate charge is made an undue preference and advantage, from which the northern lines should cease and desist by making no separate charge for transit."

"Many of the present transit circulars violate the provisions of Tariff Circular 20, and are confusing, because they publish rates in connection with transit provisions. They should be confined to transit rules and leave the rates to be published in rate tariffs."

V

That the State of North Dakota owns and operates a state terminal elevator at Grand Forks with a capacity of about 2,000,000 bushels. That it also owns and operates the State Flour Mill at Grand Forks with a capacity of about 4,000 barrles per day. That there is also located at Grand Forks, North Dakota, the flour mill of the Russell Miller Milling Company with a capacity of about 1,000 barrels per day. That the North Dakota Terminal Exchange operates and maintains a grain exchange at Grand Forks with a membership of about 26, and is concerned and interested in the handling and marketing of grain pro-

duced in North Dakota and Montana. That there is a grain market at Grand Forks known as the North Dakota Terminal, where grain originating in North Dakota and Montana can be and has been inspected, protein-tested, stored, cleaned, processed and milled and diverted en route into fields of consumption and to other markets. That during the year 1930, about 30 million bushels of grain was inspected or handled at and through the North Dakota Terminal.

VI

That grain marketed, stored or milled at the North Dakota Terminal pays a transit penalty of 1½¢ per cwt. when it originates in North Dakota and 2½¢ per cwt. when it originates in Montana whereas Terminals like Minne- [fol. 601] apolis, Saint Paul, or Duluth, handling the same grain from the same territory, pay no transit penalties whatever.

That grain stored or milled at the North Dakota Terminal pays to the serving carriers, the Great Northern Railway, or the Northern Pacific Railway, when the grain is destined East of Minneapolis or Duluth, a transit penalty of 1½¢ per cwt. when the grain originates in North Dakota and 2½¢ per cwt. when it originates in Montana. On the other hand, grain stored or milled at other North Dakota points upon the "Soo" Railway such as Minot, Devils Lake or Valley City pays no transit penalty whatever for milling the grain at such points when the products are destined East of Minneapolis or Duluth.

That this North Dakota Terminal is the only grain marketing terminal located in Spring Wheat Territory, and serving a large Spring Wheat Territory stretching across North Dakota and into Montana. That this Terminal in marketing, storing or milling the grain tributary to it must not only pay the transit penalties hereinbefore mentioned but also must pay into destination and consuming territory a combination of rates; whereas grain terminals like Minneapolis, St. Paul or Duluth have free transit privileges and the advantage of proportional rates both from the Northwest as well as from the Southwest.

VII

That the said action known as Docket No. 19,842 was commenced by the filing of a complaint with the Interstate

Commerce Commission in July, 1927. That ever since said time, the unduly prejudicial and preferential transit practices have been continued to the detriment and damage of your petitioners in said North Dakota Terminal, and to the prejudice of producers and shippers utilizing said North Dakota Terminal, all as found by said Interstate Commerce Commission in said Docket No. 17,000, Part 7, and as hereinbefore set forth.

[fol. 602]

VIII

That from time to time, the said carriers named as complainants herein, have sought and secured postponement of the effective date of the order of said Interstate Commerce Commission, involved herein, the last postponement being the date of June 1, 1931, when its said order should be made effective. That all of said postponements and adjournments have been to the detriment and to the damage of your petitioners and to the producers and shippers above mentioned.

IX

That the said complainants, the said carriers, can easily and readily remove the present existing prejudice, and unreasonable transit penalties affecting your petitioners, the North Dakota Terminal and the producers and shippers involved, by making and filing transit tariffs as required by the order of said Interstate Commerce Commission. That, in truth and in fact, as your petitioners have been informed, the said complainants have prepared or caused to have been prepared, transit tariffs to comply with the order of said Commission, and will have the same ready for compliance with the order of said Interstate Commerce Commission so that the same may become effective June 1, 1931, unless restraining order or Interlocutory injunction should be issued as requested by the complainants in this proceedings.

X

That, if said complainants do file such transit tariffs as ordered by said Interstate Commerce Commission, it will occasion to the carriers no revenue loss in fact, and that the petition in respect thereto, concerning revenue losses, states no cause of action or right for any relief in equity.

XI

That, in any event, the particular, unreasonable, unduly preferential and prejudicial transit penalties found by said [fols. 603 & 604] Interstate Commerce Commission as imposed and now assessed upon said Northern Lines to the detriment and damage of your petitioners, the North Dakota Terminal, and the producers and shippers involved, can be and ought to be readily and easily removed by the carriers involved; namely, said Northern Lines, the Great Northern Railway Company and the Northern Pacific Railway Company, by filing and making transit tariffs pursuant to the order of said Interstate Commerce Commission.

That in respect thereto, the application and petition of said complainants herein, states no cause of action or right for equitable relief.

XII

That it is of pressing importance to your petitioners and to the North Dakota Terminal and the shippers and producers involved, that the existing prejudice and unduly preferential conditions now long continued, be removed without further delay on or after June 1, 1931, and particularly so for purposes of handling and marketing the grain crops of North Dakota and Montana produced in territory tributary to the North Dakota Terminal during the year 1931.

Wherefore, your petitioners respectfully request that the bill of said complainants be dismissed and that no equitable relief be granted as requested by said complainants. And further, that, in any event, no equitable relief be extended by this Court to continue the prejudicial and unduly preferential practices as found by the said Interstate Commerce Commission with respect to transit upon said Northern Lines, and as affecting your petitioners herein.

Harrison A. Bronson, Attorney for the Petitioners in Intervention. Residence: Grand Forks, North Dakota.

[fols. 605 & 606] IN UNITED STATES DISTRICT COURT

10479

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE—May 7, 1931

On motion of solicitors for the State of North Dakota it is ordered that leave be and the same is hereby given the State of North Dakota to intervene in the above entitled cause.

[fols. 607 & 608] IN UNITED STATES DISTRICT COURT

10479

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE—May 7, 1931

On motion of solicitors for The Board of Trade of Kansas City it is ordered that leave be and the same is hereby given the Board of Trade of Kansas City to intervene in the above entitled cause.

[fol. 609] IN UNITED STATES DISTRICT COURT

In Equity. No. 10479

[Title omitted]

ANSWER OF UNITED STATES OF AMERICA—Filed May 6, 1931

United States of America, one of the defendants in the above-entitled cause, for answer to the petition therein answers and says:

I

United States admits the allegations of the opening paragraph and paragraphs numbered I, II, and III of the petition, with these exceptions:

It admits that petitioners bring the petition in behalf of themselves as alleged in the opening paragraph, but denies

that petitioners are suing, and that they have any right to sue or maintain the complaint on behalf of any common carriers not named as parties petitioners to the petition herein;

United States respectfully refers the Court to the order of the Interstate Commerce Commission instituting an investigation into the rate structure of common carriers by railroad, Exhibit A to the petition, mentioned in said [fol. 610] paragraph II of the petition, for full and complete information concerning the matters and things set forth and stated by the Commission in said order;

United States says it is without knowledge, information or belief concerning the allegation in said paragraph II that "the carriers were informally advised that the Commission was considering the issuance of a supplemental report and order", and as to said allegation it neither admits nor denies; but admits that said Commission made and issued the supplemental report and order on April 10, 1931, mentioned in said paragraph II and annexed as Exhibit F to the petition.

II

United States, for answer to the matters, things and conclusions alleged in paragraphs numbered IV and V of the petition admits that the Commission made and rendered its reports and orders in the proceedings mentioned in said paragraphs and several sub-divisions thereof, which said reports and decisions are officially reported in the printed volumes of said Commission's reports and decisions cited in said paragraphs; but United States denies that the petition contains a full, complete and fair statement of said reports and orders, and respectfully refers the Court to the full and complete reports and decisions for a comprehensive, impartial, true and complete statement of the matters and things therein found and determined by the Commission;

Further answering the allegations of said paragraphs IV and V, United States, while admitting that said Commission made and rendered the reports and decisions therein mentioned, denies the relevancy and materiality of anything in said reports and decisions to the issues laid by the allegations of the petition; and alleges that said decisions are not res judicata and have no bearing on the legal-

[fol. 611] ity and validity of the rates prescribed by the Commission in the particular order sought to be enjoined and annulled by the petition; and further alleges that the matters, things and conclusions set forth and alleged in said paragraph IV and V with respect to the Commission's said reports and decisions are argumentative, irrelevant, incompetent and immaterial to the issue presented by the petition, and United States, therefore, moves that the Court strike the allegations of said paragraphs IV and V from the petition.

III

For answer to the allegations contained in paragraph numbered VI of the petition, United States admits that on January 30, 1925, the Congress of the United States adopted a joint resolution generally known as the Hoch-Smith Resolution, 43 Stat. L. 801, to the full text of which the Court is respectfully referred for complete information concerning the language and provisions thereof.

IV

United States, for answer to paragraph numbered VII of the petition, says that the matters and things therein alleged are conclusions argumentative, speculative and irrelevant, incompetent and immaterial to the issues *by* laid by the petition, and, therefore, require no answer; but if said allegations should become relevant, material or competent, United States denies such and every allegation of said paragraph and will require strict proof of the petitioners with respect to them;

Further answering the allegations of said paragraph and particularly sub-division (4) thereof, United States expressly denies that the order sought to be enjoined is [fol. 612] void or in excess of the statutory duties and powers of the Commission, and further denies that in making and entering it the Commission misinterpreted, misconstrued or disregarded the requirements of the Interstate Commerce Act or any provision thereof, either with respect to the duty of said Commission thereunder or the rights of the petitioners or any of them as provided for in said Act.

V

Answering paragraph VIII of the petition, United States admits that said Commission instituted on its own motion the proceeding which resulted in the making of the order sought to be enjoined, and respectfully refers the Court to the Commission's said order, Exhibit A to the petition, instituting the proceeding for a full complete and accurate statement of the contents thereof;

Further answering said paragraph VIII, United States admits that on July 20, 1927, said Commission made its reports and orders in proceedings entitled as alleged subdivision (b) of said paragraph VIII, and that its second order in said proceedings, which required certain reductions in rates on deciduous fruits from California to eastern destination, was held to be valid and lawful by the District Court of the United States for the Northern District of California in Ann Arbor Railroad Company, et al. v. United States, et al., 30 F. (2d) 940; and that the judgment of said Court was reversed on appeal to the Supreme Court of the United States, 281 U. S. 58; and United States respectfully refers this Court to the reported decisions of the two courts mentioned for full, complete and accurate information concerning the holding therein with respect to the Commis- [fol. 613] sion's order in said proceeding, and denies that sub-division (c) of said paragraph VIII contains an accurate and complete statement of the opinion of the Supreme Court in said case;

For further answer to sub-division (d) of said paragraph VIII, United States admits the matters and things therein alleged with these exceptions:

1. It denies that the supplemental order of the Commission in the present case amended the original order in minor particulars only, and respectfully refers the Court to said supplemental order, Exhibit F to the petition, for full and complete information concerning the matters therein stated and required;

2. It denies the conclusion and inference in said subdivision (d) that the Commission's report and order are subject to the infirmities found by the Supreme Court with respect to its order in the proceeding cited in said subdivision, and United States alleges that, as appears from the

allegations of said sub-division (d), the Commission had under consideration for a full year the voluminous testimony, exhibits, briefs, exceptions, argument and memoranda submitted by counsel in the instant case, and during that time carefully weighed, considered and analyzed said testimony, exhibits and other data, and reached its conclusions of fact thereon in full conformity with the duties, functions and authority required and imposed upon it by the Interstate Commerce Act;

United States expressly denies each and every allegation contained in sub-division (e) of said paragraph VIII;

Further answering said paragraph VIII, and particularly sub-divisions (a), (b), (c) and (d) thereof, United [fol. 614] States alleges that the matters, things and conclusions in said sub-divisions set forth and alleged are argumentative, irrelevant, immaterial and incompetent, and United States, therefore, moves that said sub-divisions of said paragraph VIII be stricken from the petition.

VI

Answering paragraph numbered IX of the petition, United States alleges that the matters, things and conclusions in said paragraphs and the several sub-divisions thereof are argumentative and speculative, and are incompetent, irrelevant and immaterial to the Court's consideration of the question whether the order sought to be enjoined is lawful and valid; but if said allegation should become relevant and material, United States denies each and every allegation thereof, and on the trial of this case will require strict proof of each of said allegations;

Further answering said allegations, United States expressly denies that in making and rendering the said report and order sought by the petition to be enjoined and annulled the commission proceeded upon an erroneous conception or interpretation of the Interstate Commerce Act or said Hoch-Smith Resolution, or of its powers and duties thereunder; and alleges that the order is valid and lawful in all respects, and that in making and entering it the Commission acted fully within its statutory powers under the Interstate Commerce Act, and alleges further that said order is fully supported by findings made and contained in the Commission's report, and that both said findings and

said order are amply supported by substantial evidence duly heard, received, considered and weighed by the Commission in the proceeding before it;

[fol. 615] United States further denies that said order is void or beyond the authority of the Commission for the reasons set forth in said paragraph IX, or any of them;

United States further denies that said order requires a reduction in all rates on grain, as alleged in sub-division (a) of said paragraph IX, and alleges that the rates prescribed by said order will result both in a reduction of many of the rates now in existence, and in an increase of many other rates now in existence.

VII

United States denies each and every allegation made and contained in paragraphs X, XI and XII of the petition, with this exception:

It admits that in making its said order the Commission weighed and considered certain analyses and estimates with respect to the revenues of the carriers, including petitioners, submitted upon and appearing in the record of testimony in said proceeding;

Further answering said paragraph XII, United States expressly denies that the said order is void or is in violation of the Fifth Amendment to the Constitution of the United States for the reasons set forth in said paragraph, or for any other reason.

VIII

Answering paragraph numbered XIII of the petition, United States admits that petitioners and other common carriers by railroad filed their petition, Exhibit 1 to the petition, with the Commission for a rehearing and reconsideration, and the Court is respectfully referred to said Exhibit 1 for a full and complete statement of the matters and things alleged in that petition. United States further [fol. 616] admits that the Commission denied said petition for rehearing; but United States denies that the Commission's denial of said petition for rehearing and the request of the carriers for a postponement of the effective date of said order constituted an abuse of the Commission's administrative discretion, and denies that such action was in

excess of the Commission's statutory authority, and further denies that said action by the Commission constituted a denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States, or any statute or law of the United States, or any right of petitioners thereunder.

IX

United States denies the allegations of paragraph numbered XIV of the petition.

X

Answering paragraph numbered XV of the petition, United States expressly denies that said order of the Commission will, unless restrained and suspended, result in irreparable injury to petitioners, or in any other legal damage to them;

Further and affirmatively answering said paragraph, United States alleges that, as shown by the allegations of paragraph II of the petition, the original order of the Commission was issued July 1, 1930, and required to become effective on October 1, 1930 (Exhibit E to petition), but that the Commission, itself, has from time to time postponed the effective date of said order from October 1, 1930, to June 1, 1931, and that by said voluntary action of the Commission, the petitioners have been given and accorded a period of eleven months within which to file and publish the [fol. 617] rates prescribed by said order.

XI

Further answering the petition and the numerous allegations of fact and conclusions therein contained, United States expressly denies each and every allegation thereof not herein expressly admitted, and denies each and every allegation in the petition which is contrary to, or inconsistent with, the facts herein alleged and the findings of fact and conclusions made and stated in said report of the Commission, attached as Exhibit E to the petition, hereby referred to and made a part hereof. United States further denies that said order is void or unlawful in any respect whatsoever for the reasons set forth and alleged in the petition, or for any other reason; and United States denies

that in making and entering said report and order the Commission acted arbitrarily, unreasonably or otherwise in violation or in excess of the authority conferred upon it by the Interstate Commerce Act;

United States, further answering the petition, alleges that, as shown in the allegations of the petition, said report and order were made and entered by the Commission upon and after prolonged hearings, during which the Commission heard and received 53,000 pages of oral testimony, 2100 exhibits and 20,000 pages of briefs, exceptions and argument of counsel; that in making and entering said report and order the Commission carefully weighed and considered in the light of its experience all of said oral and documentary testimony, and that the findings and conclusions of fact set forth and contained in its said report, and said order based thereon, are fully supported by said evidence;

That upon said voluminous record of evidence the Com- [fol. 618] mission found and concluded that the rates prescribed in its said order were just and reasonable and otherwise lawful under the Interstate Commerce Act.

Wherefore, having fully answered the petition, United States prays that the relief therein prayed be denied and the petition dismissed with costs to the petitioners, and that it have the benefit of such other and further orders, decrees, or relief as may be just and proper.

Elmer B. Collins, Elmer B. Collins, Special Assistant to the Attorney General. John Lord O'Brian, The Assistant to the Attorney General. George E. Q. Johnson, United States Attorney.

[fols. 619 & 620] *Duly sworn to by Elmer B. Collins. Jurat omitted in printing.*

[fol. 621] IN UNITED STATES DISTRICT COURT

In Equity. No. 10479

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION—Filed May 6, 1931

The Interstate Commerce Commission, one of the defendants in the above-entitled suit, hereinafter referred

to as the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioners' petition contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraphs I, II and III of the petition, the Commission admits, for the purposes of this suit, that the allegations therein are true.

[fol. 622]

II

Answering paragraphs IV and V of the petition, the Commission admits that it made the reports specified in the various sub-paragraphs but avers that the said reports contain the findings and conclusions of the Commission in said proceedings and respectfully refers the Court to said reports for information concerning its findings and conclusions.

Further, the Commission avers that the allegations contained in said paragraphs savor of a plea of res adjudicata or estoppel; that if intended to be such, said allegations are wholly insufficient; moreover, that a plea of res adjudicata or estoppel cannot be asserted or maintained with respect to a proceeding, finding or order of the Commission, made in the exercise of its rate making powers, conferred by the Congress.

The Commission also avers that the allegations in said paragraphs contained are immaterial, irrelevant and neither constitute nor set forth a cause of action against this defendant, neither do they in connection with the other allegations of the petition set forth any matter constituting in whole or in part a cause of action against this defendant, particularly for that the order complained of and sought to be set aside in this suit was entered in a proceeding separate and distinct from the proceedings specified and referred to in said paragraphs.

[fol. 623]

III

Answering paragraph VI of said petition, the Commission admits that Congress adopted the joint resolution

known as the Hoch-Smith Resolution, referred to in said paragraph.

IV

Answering paragraphs VII to XV, inclusive, of said petition, the Commission admits and alleges that upon its own motion, by an order dated the 12th day of March 1925, it instituted a proceeding entitled Docket No. 17000, Part VII, Grain and Grain Products within Western District and for Export; that with that proceeding certain other complaint and Investigation and Suspension proceedings were consolidated for initial or further hearing; that a great number of railroad companies, including the petitioners herein, were made parties in said proceeding Docket No. 17000, Part VII; that full hearings were had and thereafter the Commission made, entered and served upon all parties in said proceeding, including the petitioners herein, the report and order of July 1, 1930, 164 I. C. C. 619, made a part of the petition herein as "Exhibit E", to which the Commission respectfully refers the Court for information concerning its findings and requirements in the premises; that subsequently the Commission made, entered, and served upon all the parties in said proceeding, including the petitioners, its Supplemental Report and Order, of April 10, 1931, referred to in and made a part of the petition as "Exhibit F", to which the Commission respectfully [fol. 624] refers the Court for information concerning its findings and requirements in the premises; that in said proceeding and prior to the making, entering and serving of said reports and orders, the parties thereto, including the petitioners herein, were, and each of them was, accorded the full hearing provided for by the Interstate Commerce Act; that in said hearing a great volume of testimony and other evidence bearing upon the matters covered in said reports and orders were submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of petitioners herein by their counsel; that at said hearings and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including the particular questions raised by petitioners in this suit, whereupon the Com-

mission determined said matters and entered and served upon all the parties to said proceeding, including the petitioners herein, its said reports and orders; that said reports and orders included the Commission's findings of fact, decision, conclusions, order and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said reports, the Commission made the findings and stated the conclusions upon which said orders are based.

The Commission further alleges that the findings and conclusions in said reports were and are, and that each of them was and is, fully supported and justified by the evidence [fol. 625] submitted in said proceeding as aforesaid; that in making said reports and orders it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including all material matters covered by the allegations of the petition herein; that said orders of July 1, 1930 and April 10, 1931, were not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making said orders the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in the petition.

Further answering paragraphs VII to XII, inclusive, the Commission denies that its orders or either of them, are invalid for any of the reasons set forth in said paragraphs; or for any other reason or reasons denies that in making its reports and orders it disregarded or misinterpreted and misconstrued Section 15a of the Interstate Commerce Act or that it proceeded upon a misconception of its powers or duties thereunder, or in excess of the authority conferred upon it. The Commission also denies that it misapplied or misinterpreted or gave improper or erroneous effect of consideration to the so-called Hoch-Smith Resolution; denies that in making its reports and orders it considered data or matters not in the record of the proceedings, or improper to be considered; denies that essential findings required to support its said orders are lacking. The Commission also [fol. 626] denies that the effect of said orders will be to deprive petitioners of their property without due process of

law or will result in irreparable damage, in violation of Constitutional provisions and guarantees or otherwise.

Further answering paragraph IX of the petition, the Commission avers that the allegations therein contained as to prior proceedings, findings and orders of the Commission, and the asserted effect or result thereof savor of a plea of res adjudicata or estoppel against this defendant; that if intended to be such, they are wholly insufficient to present such a plea; that such a plea cannot be asserted or maintained in respect of a proceeding, finding or order of the Commission made in the exercise of its rate making power, conferred by the Congress.

The Commission also avers that the allegations in said paragraph contained are immaterial, irrelevant and neither constitute nor set forth a cause of action against this defendant, neither do they in connection with the other allegations of the petition set forth any matter constituting in whole or in part a cause of action against this defendant, particularly for that the order complained of and sought to be set aside in this suit was entered in a proceeding separate and distinct from the proceedings specified and referred to in said paragraph.

The Commission in further answer to paragraph XIII of the said petition admits the filing with it of the petitions for rehearing and reconsideration, and vacation of its said order of July 1, 1930, referred to in said paragraph. It denies that the action taken thereon was or constituted an [fol. 627] abuse of its administrative discretion. On the contrary it avers that it gave due consideration to said petitions and thereafter made its supplemental report dated April 10, 1931, already referred to.

V

Answering paragraph XV of the petition, the Commission admits that failure of the carriers involved to comply with the requirements of the Commission's orders will make them subject to severe penalties, pursuant to the provisions of the Interstate Commerce Act. It denies that compliance with the said orders will result in loss of revenues to petitioners in the sum of $20,000,000 annually and avers that under said orders, petitioners and other carriers affected will be enabled to effect large reductions in operating costs,

particularly in connection with transit. Moreover, in many instances the rates ordered to be put into effect are higher than the present rates, particularly the rates prescribed on coarse grains, as appears in the tables of rates set forth in "Appendix D" to the Commission's report.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the petition in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said reports and orders of July 1, 1930 and April 10, 1931, which reports and orders are hereby referred to and made a part hereof.

[fol. 628] All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, by E. M. Reidy, H. L. Underwood. Daniel W. Knowlton, of Counsel.

[fols. 629 & 630] *Duly sworn to by Balthasar H. Meyer. Jurat omitted in printing.*

[fols. 631-633] In United States District Court

In Equity. No. 10479

[Title omitted]

Answer of Corporation Commission of Arizona et al., Intervening Defendants—Filed May 7, 1931

The Corporation Commission of Arizona, Public Utilities Commission of the State of Colorado, Public Utilities Commission of the State of Idaho, Public Service Commission of Missouri, Board of Railroad Commissioners of the State of Montana, Public Service Commission of Nevada, New Mexico State Corporation Commission, Board of Railroad Commissioners of North Dakota, Corporation Commission of Oklahoma, Public Utility Commissioner of

Oregon, and Board of Railroad Commissioners of the State of South Dakota, intervening defendants hereinafter called interveners, make answer to the petitioners' bill of complaint as follows:

[fol. 634] I

Answering the allegations of Paragraph I of said bill, the interveners admit that the same are true.

II

Answering the allegations of Paragraph II of said bill, the interveners admit that the Interstate Commerce Commission on March 12, 1925, instituted Rate Structure Investigation, No. 17,000, by an order of which a copy is set forth in petitioners' Exhibit A. The interveners also admit that said Commission, on the same date, issued the notice of which a copy is set forth in petitioners' Exhibit B. The interveners also admit that the Commission thereafter divided said investigation into parts, one of which parts was to cover rates on grain and grain products in the Western District; and that said Western District is described as alleged in said paragraph, said part being referred to in the petitioners' bill as the "present proceeding" or as "the grain case," as the same hereinafter in this answer is also designated.

The interveners deny, however, that the said parts of said Rate Structure Investigation became separate cases, and say that each part thereof continued a branch of the Rate Structure Investigation. For full and complete information as to the provisions of said order making such separation into parts the interveners refer the court to the order itself.

III

Answering the allegations contained in Paragraph III of said bill, the interveners admit that the same are true.

[fol. 635] IV

(a) Answering the allegations contained in subparagraphs (a), (b) and (c) of Paragraph IV of said bill, the interveners admit that the Interstate Commerce Commission made decisions in the cases therein referred to, which decisions are reported as therein cited. The interveners

deny, however, that said decisions or any findings or order or orders made therein are relevant for consideration in this proceeding, wherein attack is made upon the order of the Commission upon the ground that said order is void upon its face, and wherein no allegation is made that the evidence before the Commission, in the proceeding in which said order was made, was not sufficient fully to support and justify the findings upon which said order was based. The interveners answering further say that said decisions were rendered long ago in proceedings in no way connected with the grain case, and that facts therein found are not res adjudicata in any later proceedings before the Commission.

Said interveners allege that there was evidence in the record as to the aforesaid decisions and the orders of the Commission therein, and as to changes in the rates on grain and grain products in the Western District which resulted therefrom, and that such evidence was duly considered by the Commission in connection with all other relevant evidence in said record, as it could and can alone properly be considered as in any way relating to the validity of said order.

(b) Answering the allegations contained in subparagraphs (d) and (e) of said Paragraph IV, the interveners deny that the statements by said subparagraphs alleged to have been made by the Interstate Commerce Commission [fol. 636] in a special report dated January 21, 1931, were contained in any report ever adopted by the Interstate Commerce Commission. The interveners admit that said statements were made in a letter from the Chairman of the Legislative Committee of the Interstate Commerce Commission to the Chairman of the Interstate Commerce Committee of the United States Senate, in a discussion of certain proposed legislation, but they deny that said letter is relevant for consideration herein.

Answering the allegations contained in subparagraph (e), to the effect that the carriers in the Western District have never since 1920 received the rate of return contemplated by Section 15a of the Interstate Commerce Act and that the order in the grain case was made by the Commission with full knowledge of that fact, the interveners allege that the aggregate value of the property of the carriers in the Western District from year to year since 1920 has not been correctly determined, and is not known. The inter-

veners accordingly neither admit nor deny said allegations, but leave the petitioners to their proof.

V

(a) Answering the allegations contained in subparagraphs (a), (b) and (c) of Paragraph V of said bill, the interveners admit that the Interstate Commerce Commission made decisions in the proceedings therein referred to, which decisions are reported as cited therein. As to said allegations relating to the matters decided in said proceedings and as to any findings or order or orders therein, the interveners neither admit nor deny the same, but refer the court to the decisions themselves. The interveners, however, deny the relevancy of any of said matters for consideration herein, under any allegation in the petitioners' bill [fol. 637] contained. They allege that said decisions were made many years ago, in proceedings in no way connected with No. 17,000, Part 7, and that the said decisions, findings and orders are irrelevant for consideration in this proceeding, except as they were introduced into the record in the grain case, and that, so far as they were introduced, they are relevant for consideration only as a part of the entire record, and in connection with other evidence contained in said record bearing upon the same issues.

Further answering said allegations, the interveners say that the Interstate Commerce Commission rendered an important decision with respect to the level of rates on grain and grain products, covering a large area within the Western district, in a case not cited by the petitioners in said subparagarph, but which must be embraced in any consideration which may be given to the cases which the petitioners have cited. This decision was in "Grain and Grain Products from, to, and Between Illinois, Iowa, Minnesota, North Dakota, South Dakota, and Wisconsin Points," 122 I. C. C. 235. That case was an investigation and suspension proceeding, in which the Commission had before it certain schedules proposing to increase the level of rates on grain and grain products in the Northwest. The Commission had before it much evidence as to the cost of service, and as to the level of said rates in comparison with rates in effect in other parts of the Western District upon grain and upon other commodities. The Commission found that the proposed rates were in general lower mile for mile than

rates in effect which the Commission had prescribed in other territories in the Western District. Considering the evidence as to cost of service, however, the Commission said, at page 265 of its report:

[fol. 638] "On the other hand, the evidence as to relative earnings and cost of service which was presented by the North Dakota complainants, while not free from defects and susceptible of criticism, does clearly warrant the conclusions that the present rates of the respondent carriers on grain and grain products are by no means unremunerative rates, and that they yield earnings which compare quite favorably with the earnings which these carriers derive from the rates on many other forms of traffic and with the earnings which other carriers in the western group derive not only from other commodities, but from grain and grain products as well. * * *

It is evident, especially in the light of the Hoch-Smith resolution, that the rate structure in the northwestern and western trunk-line regions requires an analysis and investigation of a more thorough and fundamental character than it has yet received. It is also clear from the record in this case that the rates on grain and grain products, particularly to the primary markets, are deserving of consideration, from the standpoint of relative earnings and fair share of the transportation burden, which perhaps has not hitherto been sufficiently given them. We have pending No. 17,000, Part 7, Grain and Grain Products, hereinafter called the general investigation, which embraces the rates on grain and grain products in the entire western district and from that district to the ports of the country for export. That proceeding will afford the opportunity for such consideration."

The Commission in that case did not permit the rates involved to be increased. They are, however, to be increased under the order in the grain case.

(b) Answering the allegations contained in subparagraph (d) of said Paragraph V, the interveners deny the same.

[fol. 639]

VI

Answering the allegation contained in Paragraph VI of said bill, the interveners admit that the same is true.

VII

(a) Answering the allegations contained in subparagraph (a) of Paragraph VII of said bill, the interveners say that they are not sufficiently familiar with the history of the rates now in effect to admit or deny the same; but the interveners deny that the fact alleged, if true, is relevant for consideration under any allegation in the petitioners' bill contained.

(b) Answering the allegations contained in subparagraphs (b), (c) and (d) of said Paragraph VII, so far as the same relate to any findings or order made by the Interstate Commerce Commission in said grain case, the interveners neither admit nor deny the same, but refer the court to the report, the supplemental report and the order made in said proceeding for a full statement of the matters and things decided and of any order made by the Commission.

(c) Answering the allegations contained in said subparagraph (d), to the effect that the Interstate Commerce Commission in the order made by it in said proceeding disregarded the requirements of Section 15a, and misinterpreted and misconstrued said section, and made said order in excess of its duties and powers created by the Interstate Commerce Act, the interveners deny the same.

[fol. 640] VIII

(a) Answering the allegations contained in subparagraph (a) of Paragraph VIII of said bill, the interveners admit that said grain case was initiated by the Interstate Commerce Commission on its own motion and by reason of the Hoch-Smith Resolution. Said interveners deny, however that said Hoch-Smith Resolution was emphasized by said Commission throughout said proceeding, and allege that the Commission, after the decision of the United States Supreme Court in Ann Arbor Railroad Company, et al. v. United States, 281 U. S. 58, did not regard said Resolution as affecting its pre-existing powers, and made its decision in the grain case under the provisions of the Interstate Commerce Act, as appears from the face of the report.

(b) Answering the allegations contained in subparagraph (b) of said Paragraph VIII, the interveners admit

that the Interstate Commerce Commission made decisions in the proceedings therein referred to, which decisions are reported as cited therein. As to the matters decided therein, however, and as to the order of the Commission alleged to have been made therein, the interveners neither admit nor deny the same, but refer the court to said decisions themselves for a full and complete statement of said matters and order. Other allegations in said subparagraph contained, the interveners admit to be true.

(c) Answering the allegations contained in subparagraph (c) of said Paragraph VIII, the interveners admit that the decision of the United States District Court in Ann Arbor Railroad Co. et al. v. United States, referred to in said subparagraph (b), was, on June 2, 1930, re-[fol. 641] versed by the Supreme Court of the United States, which said decision is reported as cited in said paragraph (c). The allegations of said subparagraph as to the grounds of said reversal, the interveners neither admit nor deny, but refer the court to the opinion for full and complete information with respect thereto.

(d) Answering the allegations contained in subparagraph (d) of said Paragraph VIII, the interveners admit that the decision of the Supreme Court of the United States in said last mentioned case, referred to in said subparagraph (d), was rendered on June 2, 1930, and that the report and original order of the Interstate Commerce Commission in No. 17,000, Part 7, was rendered on July 1, 1930. The remaining allegations contained in said subparagraph (d), relating to matters said to appear from the face of said report, the interveners neither admit nor deny, but refer the court to said report, for full and complete information as to all of said matters.

(e) Answering the allegations contained in subparagraph (e) of said Paragraph VIII of said bill, the interveners deny that the same are true.

IX

(a) Answering the allegations contained in subparagraph (a) of Paragraph IX of said bill, the interveners admit that many of the existing rates on grain and grain products in the Western District have heretofore been

largely prescribed or reviewed by the Interstate Commerce Commission. The allegations as to the extent to which said rates, in proceedings before said Commission, have been so prescribed or approved, the interveners neither [fol. 642] admit nor deny, but refer the court to such decisions as may relate thereto for full and complete information as to the matters and things decided therein. Further answering, said interveners allege that there was evidence in the record as to such decisions and orders of the Commission, and as to changes in rates resulting therefrom, and that such evidenec was duly considered by the Commission in connection with all other relevant evidence, as it could and can alone be properly considered as in any way relating to the validity of the Commission's order in the grain case.

(b) Answering the allegations contained in subparagraph (b) of said Paragraph IX, the interveners admit that the Interstate Commerce Commission rendered decisions in the cases referred to in said paragraph, which decisions are reported as cited therein. The allegations as to reductions made by the report in the grain case in the rates involved in those proceedings, however, the interveners neither admit nor deny, but refer the court to the order itself for full and complete information with respect to its requirements. Further answering said allegations, the interveners deny that the said order was in any part based upon any misconception by the Commission of its duties and powers.

(c) Answering the allegations contained in subparagraph (c) of said Paragraph IX as to what appears from the report of the Commission in the grain case and as to the requirements of its order, the interveners neither admit nor deny said allegations, but refer the court to said report and order for full and complete information as to the provisions and requirements thereof.

(d) Answering the allegations of subparagraph [illegible] of said Paragraph IX, insofar as said allegations re[illegible] the several decisions of the Interstate Commerce Com- [fol. 643] mission which are referred to therein, the interveners neither admit nor deny said allegations, but refer the court to said decisions for full information as to the findings and orders therein made. As to the allegation

that the Interstate Commerce Commission in making the rate changes required by its order in the grain case did not proceed under the standards of the Interstate Commerce Act, the interveners deny that the same is true.

(e) Answering the allegations contained in subparagraph (e) of said Paragraph IX, the interveners admit that the report and order of the Interstate Commerce Commission in the grain case dealt with the grain rate structure in the Western District as a whole, and that the order requires the reduction of many rates which in other proceedings the Commission had prescribed or approved. All other allegations in said subparagraph the interveners deny.

Further answering, the interveners allege that said order also prescribes advances in a great number of rates applicable to the movement of a vast body of traffic, and likewise prescribes changes in transit rules which will operate greatly to increase the carriers' revenues.

X

Answering the allegations contained in Paragraph X of said bill, the interveners deny that the same are true.

XI

(a) Answering the allegations contained in subparagraph (a) of Paragraph XI of said bill, so far as the same relate to matters said to appear from pages 697 and 698 of [fol. 644] the report of the Commission in the grain case, the interveners deny that it appears therefrom that the Commission considered anything outside the record in said proceeding in coming to its decision and making its order therein. The checks and estimates therein referred to, as will appear from the face of said report, were checks and estimates made by the Commission based upon the evidence in the record, in the course of its study and consideration thereof. For full and complete information with respect to this matter the interveners refer the court to the report itself.

(b) Answering the allegation contained in subparagraph (b) of said Paragraph XI that it appears from page 698 of the Commission's report in the grain case that the Commission took into consideration supposed increases in reve-

nue granted in certain other cases, the interveners neither admit nor deny said allegation, but refer the court to the portion of said report referred to for full and complete information with respect thereto.

Answering further, the interveners allege that said grain case is a part of the Rate Structure Investigation, required to be made by the Hoch-Smith Resolution, and instituted by the order of investigation which is set out in petitioners' Exhibit B; that the petitioners were made respondents in said investigation proceeding and were active parties therein, and in every branch thereof; that said Rate Structure Investigation, notwithstanding its divisions into parts for purposes of its more convenient conduct, is an entirety, the purpose of which, as provided by the Hoch-Smith Resolution, is to determine "to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage, as [fol. 645] between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities and to make, in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist." Said resolution directs that the Commission shall from time to time "make such decisions and orders as it may find to be necessary or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates."

The interveners further allege that inasmuch as the purpose of the investigation, which is directed by the resolution to be made, is to make proper distribution of the rate burden, as between the various classes and kinds of commodities transported, it is impossible for the Commission to perform the duty laid upon it unless it shall give due consideration, when fixing the rates for any given class of traffic to the rate levels upon other clases of traffic which have been fixed in the course of the investigation. The interveners further say that the petitioners, being respondents to the original order of investigation, and parties to every branch of said investigation, at all times have had full opportunity to introduce evidence before the Commission and to cross-examine all witnesses offered by other

parties, and to be fully heard in every branch of said proceeding, and that as parties, they have had full knowledge of all evidence offered and of every change in rates made in said general investigation prior to the making of the Commission's order in the grain case. Answering further the allegations of said subparagraph, the interveners deny that the Commission in making its order aforesaid gave consideration to facts and matters outside the record before it.

[fol. 646] (c) Answering the allegations contained in subparagraphs (c) and (d) of said Paragraph XI, the interveners deny that it appears from the face of the Commission's report that it considered facts and matters outside the record before it. For full information with respect thereto the interveners refer the court to the report itself. As to what the record contains bearing upon the net operating income of the carriers for the year 1928, the interveners are not sufficiently informed to admit or deny the allegation contained in said subparagraph, and they leave the petitioners to their proof.

XII

Answering the allegations contained in Paragraph XII of said bill as to what appears from the report of the Interstate Commerce Commission in the grain case, the interveners neither admit nor deny the same, but refer the court to the report itself for full information as to its contents. The allegations as to conclusions to be drawn from what is said in said report and all other allegations in said paragraph contained, the interveners deny.

XIII

(a) Answering the allegations contained in subparagraph (a) of Paragraph XIII of said bill, the interveners admit that the same are true.

(b) Answering the allegations contained in subparagraph (b) of said Paragraph XIII, with respect to the presentation of statements to the Commission by a Committee of Western Railway Executives, copies of which are set out in Petitioners' Exhibits J and K, the interveners admit that said statements were presented. Further an-

[fol. 647] swering with respect thereto, the interveners al-

lege that said statements were not filed in the grain case, and that intent that they should affect the decision of the Commission in that case was expressly disclaimed by said Committee, as appears from the following facts, which the interveners understand to be true and therefore allege:

Said Committee was advised by the Commission that ex parte discussion of said grain case and other cases pending before the Commission could not be received, by a letter from the Chairman of the Commission to the Chairman of said Committee, dated October 11, 1930, as follows:

"I have placed before the Commission your personal request, made on behalf of a committee composed of presidents of western railroads, for an informal conference to discuss the general conditions of those railroads, with particular reference to the grain case and the Western Trunk Line class rates case. The Commission directs me to advise you that such a discussion will, of necessity, involve litigated cases upon which formal petitions are now pending. Therefore your request cannot, with propriety, be granted."

Following this advise said Committee, on November 6, 1930, presented to the Commission the statement which is set out in Petitioners' Exhibit J. Said statement contained the following assurance:

"It is not our purpose in presenting this statement to undertake to affect the decision of pending cases, but simply to bring these concrete facts to your attention that they may be given consideration in your administration of the duties which Congress has directed the Commission to discharge."

The Chairman of the Interstate Commerce Commission made acknowledgement of said statement on November 10, 1930, by letter in part as follows:

[fol. 648] "We note your purpose in submitting the statement is not to affect the decision of pending cases; and, of course, any such matters must be considered and passed upon by us upon the records in those proceedings, conformably with the law and settled practice of the Commission. * * * The matters to which you have directed our attention are important, and are such that we have borne

and will bear them in mind for appropriate consideration in the administration of the act. The statement makes no suggestion as to any action by us deemed by you to be feasible to relieve the revenue situation of the Western railroads or legally necessary in the premises; should such requests be presented, they will be given earnest and prompt consideration."

It was in response to this letter that the statement or letter dated November 26, 1930, which is set out in Petitioners' Exhibit K, was presented to the Commission, as appears from the face thereof. The interveners therefore understand and allege that said letter or statement was received in reliance upon the assurance contained in the preceding statement, which has been hereinbefore quoted. Notwithstanding said assurance, however, it now appears that said communications were designed to affect the decision of the grain case. In said subparagraph (b) the petitioners say:

"On or about the twenty-sixth day of January, 1931, upon inquiry by said Committee as to the action taken or to be taken in respect of said request said Committee was informed by the Commission that, in order for action to be taken thereon, the filing of a formal petition by the carriers would be required."

(c) Answering the allegations in subparagraph (c) of said Paragraph XIII, the interveners admit that on February 18, 1931, the petitioners did file with the Commission a formal petition to vacate and set aside the order of the Commission in the grain case, and to reopen the pro-
[fol. 649] ceedings for further hearing, in which petition substantially the same information previously placed before the Commission in said statement, as to financial results of operation and other matters was incorporated and the allegations set out in said subparagraph (c) were made. The concluding allegation of said subparagraph (c), to the effect that each and all of the facts alleged in said petition to vacate and set aside said order are true, the interveners deny.

(d) Answering the allegation contained in subparagraph (d) of said Paragraph XIII, the interveners admit that the same is true.

(e) Answering the only allegations of fact contained in subparagraph (e) of said Paragraph XIII, the interveners admit and allege that the order of the Commission in the grain case, which was originally made to become effective October 1, 1930, has not yet taken effect, for the reason that the effective date thereof has been from time to time postponed by order of the Commission upon the petition of the petitioners herein, and upon their representations that the mechanical difficulties of revising the great number of rates involved, and of publishing the tariffs to put the revised rates into effect, made such postponement imperatively necessary to enable compliance with the order of the Commission to be made.

Further answering the allegation of said subparagraph (e), the interveners deny that the petition for rehearing presented by the petitioners and denied by the Commission contained any good cause or ground for the rehearing sought, and that the record upon which the Commission's order was made is stale, and that the order of the Commission was void and beyond the power of the Commission, [fol. 650] and that the Commission in making the same, and in refusing to vacate the same or further to postpone the effective date thereof, or to reopen the grain case for further hearing, acted in disregard of the constitutional rights of the petitioners.

XIV

Answering the allegations of Paragraph XIV of said bill, the interveners deny that the same are true.

XV

Answering the allegations contained in Paragraph XV of said bill, the interveners say that they are advised and believe that the putting into effect of the rate changes required by the Commission's order in the grain case will not cause to the petitioners a net loss in revenue of $20,000,000 per annum; and upon information and belief the interveners deny said allegation.

XVI

Further answering the allegations contained in the several paragraphs of said bill, the interveners deny each and every such allegation which may be in conflict with any

allegation made in this answer, or which may be in conflict with any finding or conclusion contained in the report of the Interstate Commerce Commission in the grain case, or with the order made in said case, or with any part thereof.

[fol. 651]

XVII

Answering further, the interveners allege that the Interstate Commerce Commission, in making its said report and order, had before it a great quantity of evidence bearing upon the reasonableness of existing rates and charges upon grain and grain products in the Western District, and upon the level of rates and charges which ought reasonably to be prescribed for application to such commodities in the future in each and every part of said District, all of which it carefully weighed and considered in the light of its knowledge, experience, and informed judgment; and that in making said report and order the Commission did not act beyond its power and jurisdiction, and did not act arbitrarily, or unjustly, or contrary to the relevant evidence before it, or without full evidence to support every finding contained in its said report and said order and every part thereof.

XVIII

Answering further, the interveners say that objection to consideration of the data which the petitioners in Paragraph XI of their bill now claim was not in the record was not seasonably, nor at any time, made to the Commission. The interveners allege that the tabular statement, which gives the percentage rate of return of Class 1 carriers in the Western District, computed upon their book investment, for various years, including 1928, to which the petitioners refer in subparagraph (c) of said Paragraph XI, was contained in full on sheet 9 of the tentative report of the Examiners, recommended for adoption to the Commission which tentative report, long before the grain case was de-

[fol. 652]

cided was served upon the petitioners, with opportunity for exception thereto; that the petitioners filed such exceptions as they desired to make, and were heard in argument thereupon before the Commission, but neither in their several exceptions briefs, nor in their oral arguments, did they object to the consideration of the data contained in said tubular statement, including the return for 1928. Said tabular statement was also included in the peti-

tioners' first petition for rehearing, and was made the basis for argument, as appears from page 11 of their Exhibit I; and the returns for the year 1928 and subsequent years were discussed in their second petition for rehearing, and argument was based thereon, as appears from pages 3 to 8, inclusive, of their Exhibit K. No protest or objection to the consideration of the data contained in the aforesaid tabulation, including said return for 1928, was made, however, in either said motion, nor was such assumed consideration urged as a ground for rehearing or other action by the Commission.

XIX

Answering further, the interveners allege that the petitioners, upon the facts appearing from their bill of complaint, and alleged in this answer, are in equity estopped to deny the validity of the order which they now seek to have set aside, and are in equity entitled to no relief.

XX

The interveners answering further allege that if the enforcement of the Commission's order shall be delayed by a temporary injunction, as prayed for by petitioners' bill, irreparable injury will result to the producers of grain [fol. 653] in the aforesaid states, for the reason that the unreasonable rates which will thereby be continued in force will be borne and paid by said producers of grain, because the prices for grain are fixed and determined upon the basis of the price of such grain at the primary market, less the freight rate thereon prevailing at the time of sale; and, therefore, any bond requiring reparation to be paid to shippers will not operate to require reimbursement to the producers, of the losses which will be sustained by them by reason of such temporary injunction.

Wherefore the interveners pray that said bill of complaint may be dismissed.

D. D. McDonald, Jefferson City, Mo.; Francis Silver, Helena, Montana; James Morris, Bismarck, North Dakota; Paul A. Walker, Oklahoma City, Oklahoma; Herman L. Bode, Pierre, South Dakota; John E. Benton, 603-6 Otis Building, Washington, D. C., Solicitors for Intervening Petitioners.

[fols. 654-656] *Duly sworn to by John E. Benton. Jurat omitted in printing.*

[fols. 657-659] IN UNITED STATES DISTRICT COURT

In Equity. No. 10479

[Title omitted]

ANSWER OF INTERVENERS, THE PUBLIC SERVICE COMMISSION FOR THE STATE OF KANSAS, J. W. GREENLEAF, CHARLES D. SHUKERS, AND THURMAN HILL, MEMBERS—Filed May 7, 1931

Come now the interveners, The Public Service Commission for the State of Kansas, J. W. Greenleaf, Charles D. Shukers, and Thurman Hill, Members, and for answer to the Bill of Complaint say:

That it appears upon the face of the complaint that there is want of jurisdiction, in that the complaint fails to state a cause of action in favor of the petitioners and against the defendants and your interveners; that said complaint does not state facts sufficient to constitute a cause of action in favor of the petitioners and against the defendants and your interveners.

It appears upon the face of the complaint that there is want of equity in that the plaintiff seeks to restrain the [fol. 660] enforcement of certain specific orders of the Interstate Commerce Commission without showing (a) the institution or threat of any proceeding to enforce such orders, (b) any injury to property rights, actual or threatened, (c) the lack of an adequate remedy at law, (d) the existence or threat of any great immediate or irreparable injury, or (e) the necessity for or propriety of any equitable relief whatsoever; but, on the contrary, the complaint shows that the orders and decisions of the Interstate Commerce Commission complained of are valid, just and reasonable, in conformity with the testimony introduced before said Commission, in compliance with the statutes of the United States governing said actions, and within the scope of the authority and powers granted the Interstate Commerce Commission, by law.

For further answer to said Bill of Complaint the interveners say that they deny each and every, all and singular, the statements, allegations, and averments in said Bill of Complaint contained, except as are hereinafter specifically admitted or qualified.

Interveners further say:

I

That they admit that the petitioners have been and now are common carriers of property and passengers by railroad subject to the Interstate Commerce Act; and that the defendant, Interstate Commerce Commission, is a public corporation and an administrative tribunal created by the Act to Regulate Commerce, approved February 4, 1887, as amended (Interstate Commerce Act), and as such is specifically charged with the administration and enforcement of the provisions of said act.

[fol. 661] II.

Interveners admit that facts and figures as set forth in Paragraph II of the petitioners' petition are true and correct; and further answering say that the Commission on July 1, 1930, made and entered its report and order requiring petitioners to establish and make effective rates therein prescribed on or before October 1, 1930; thereafter upon the request of the petitioners said effective date was postponed to January 1, 1931; thereafter upon the request of the petitioners said effective date was postponed to April 1, 1931; and thereafter upon the request of the petitioners said effective date was postponed to June 1, 1931; and all delays as to the effective date of said order and report were made upon the specific request of the petitioners.

III

Interveners further answering say; that Section 15a of the Interstate Commerce Act, added thereto by the Transportation Act of 1920, provides in part as follows:

"(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation

[fol. 662] has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

"(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States."

IV

Interveners state that they have no information concerning a special report of the Commission to the Senate Committee referred to in Subparagraphs (d) and (e) and have no knowledge thereof, and that they have no information or knowledge concerning the true valuation of petitioners' property as set forth in said Bill of Complaint and that to the best of their knowledge and belief accurate valuations of petitioners' properties have never been ascertained and are not available. For verification of statements contained in Sub-paragraphs (a), (b), and (c), interveners refer to the reports of the Interstate Commerce Commission to which reference is there made.

Further answering, interveners say there is no accurate information available concerning the value of the petitioners' properties; that the Interstate Commerce Commission, [fol. 663] proceeding under the Interstate Commerce Act, has been for many years, is now, and for many years to come will be engaged in ascertaining such value; that in Increased Rates, 1920, 58 I. C. C. 220, referred to in Subparagraph (a), the Commission's report shows that the record in that case did not contain accurate information concerning the value of the property of carriers in the West-

ern District but that the Commission there accepted an aggregate figure of $8,100,000,000 as an approximation for the purpose of that particular case only. In Reduced Rates, 1922, 68 I. C. C. 676, referred to in Sub-paragraph (c), the Commission did not go exhaustively into the value of carrier's property and stated in its opinion: "In the instant proceeding there is little of record which goes directly to the subject of value."

Interveners further answering say; that the facts alleged by petitioners in Paragraph IV relate to the average condition of all carriers in the Western District and are in no wise applicable to many carriers, particularly certain carriers who are especially large carriers of grain and grain products.

Certain of the petitioners were shown in the record before the Commission to be operating under conditions far more favorable than those indicated by the allegations of Paragraph IV of the Bill of Complaint, and some of said petitioners are among the most important grain carrying railroads.

In Exhibits Nos. 377 and 1080, introduced in the record before the Commission, the following data for certain of the petitioners were presented:

[fol. 664]

Name of petitioner	I. C. C. tentative or final valuation *valuation* plus additions and betterments to Dec. 31, 1925	Net railway operating income Dec. 31, 1926	Rate of return, per cent
A., T. & S. F.	$807,100,782	$55,493,701	6.88
M. K. T.	174,668,206	13,000,263	7.44
Mo. Pac.	349,841,372	20,333,786	5.81
St. J. & G. I.	8,650,527	488,375	5.65
St. L. & S. F.	246,983,561	23,096,371	9.35
Union Pacific	312,447,873	27,852,065	8.91
Great Northern	498,106,482	31,280,428	6.28
Texas & Pacific	105,838,044	6,240,676	5.90
G. C. & S. F.	80,463,937	6,525,674	8.11
St. L. S. W. & S. W. of Tex.	78,983,858	4,842,252	6.13
K. C. Sou.	66,183,077	5,003,842	7.56
Ft. W. & D. C.	24,898,780	4,383,571	17.61
P. & S. F.	24,679,438	4,059,506	16.45
St. L. B. & M.	17,155,556	2,362,828	13.77
La. Western	7,985,814	546,384	6.84
C. R. I. & G.	15,676,312	1,867,874	11.92
Midland Valley	13,990,577	1,297,473	9.27
L. & A.	10,385,506	860,923	8.29
N. O. T. & M.	14,997,531	1,038,870	6.93
Wichita Valley	4,523,757	480,822	10.63
H. & T. C.	42,283,885	2,461,931	5.82
Hous. E. & W. Tex.	6,879,548	673,259	9.79

Interveners further state that all carriers in the Western District as a group as well as numerous individual carriers have enjoyed a continuing improvement in financial strength over the period referred to in Paragraph IV of the Bill of Complaint, as shown in the following table of dividends paid and changes in the surplus account from year to year:

[fol. 665] Atchison, Topeka & Santa Fe Railway

Year	Dividends paid	Surplus account
1920	$19,649,795	$172,552,234
1	19,727,105	195,089,633
2	19,814,345	230,384,169
3	20,117,930	252,277,769
4	20,734,234	273,159,126
5	22,477,305	293,340,703
6	24,220,377	331,488,676
7	29,449,590	350,747,763

Union Pacific Railroad

1920	26,210,900	149,100,556
1	26,210,900	159,162,518
2	26,210,900	154,024,797
3	26,210,900	164,190,331
4	26,210,900	173,703,995
5	26,210,900	187,564,097
6	26,210,900	199,036,865
7	26,210,900	210,507,525

Chicago, Rock Island & Pacific Railway

1920	3,567,485	11,573,548
1	3,567,695	13,356,927
2	3,567,335	16,053,793
3	3,566,135	16,313,792
4	3,567,185	16,438,661
5	3,567,185	17,773,134
6	3,567,185	23,684,639
7	7,285,085	27,718,535

Western District—Class 1 Roads*

Year	Dividends paid	Surplus account
1920	159,917,218	1,491,132,332
1	254,284,302	1,512,908,706
2	156,394,801	1,568,316,427
3	156,070,246	1,644,597,023
4	156,571,690	1,712,306,421
5	162,855,672	1,898,106,603
6	177,648,897	1,964,767,617
7	183,626,615	2,036,692,921

The record in the case before the Commission also shows that the aforesaid individual carriers originate approximately seventy per cent of the grain and grain products shipped from points in the State of Kansas.

[fol. 666] V

Interveners further answering say; the Commission, in Kansas Public Utilities Commission v. A. T. & S. F. Ry. Co., 83 I. C. C. 105, referred to in Sub-paragraph (b), among other things held:

"This record affords no basis even for a suggestion as to a reallocation of the transportation burden, nor could we in fairness to the shippers of other commodities make such readjustment without giving them opportunity to be heard. This is not to say that reductions in rates can in no case be made without contemporaneous increases if carriers are not making the prescribed return. If the usual test of the reasonableness of rates, approved by experience and valid in law, shows the basis as to any commodity to be too high it would be our duty under section 1 of the Act to find such rates to be unreasonable. Many of the rates here assailed were prescribed by us; others are depressed by competition of various kinds. So far as the usual test of the reasonableness of rates shown by the record, other than perhaps the values of the commodities when viewed from

* Because of the method of reporting the figures by the Interstate Commerce Commission, dividends of switching and terminal companies are not included, but the surplus accounts of such companies are included.

the standpoint of existing prices, may be applied to the question before us, they do not indicate that the general basis of rates on the commodities here in issue is unreasonably high. The case has not been tried upon the theory that by comparison with rates upon the same commodities in other territories, or between analogous commodities in the same territory, or with reference to the earnings of the carriers under investigation, any reductions can or should be made. These comparisons, when properly made, we have found to be helpful. Upon the present record we would be led to conclude that the general basis of rates on grain, grain products, and hay within the western groups has not been shown to be unjust, unreasonable, unduly prejudicial, or otherwise in violation of the Interstate Commerce Act.

"While this case has been before us under consideration [fol. 667] since its submission, we have given careful study to the situation presented in the western groups. It is desirable that the existing record should be supplemented by a showing as to the important changes in conditions which have since occurred, and as to the lack of changes if the permanency of trends is thereby made more manifest. It will also be helpful in the proper disposition of so important a matter if the usual tests in rate cases are applied so far as they are serviceable, and if the record is made to cover more comprehensively the situation all over the territory affected instead of being so largely centered in a particular portion of it. The present and prospective financial and service needs of the carriers should also be developed. Without indicating views as to the final disposition of the matter, the case will be reopened and set for further hearing to give interested parties an opportunity to develop the foregoing and other pertinent matters. We will enter an order to that affect" (pp. 116-117).

Interveners further say; in Rates and Charges on Grain and Grain Products, 91 I. C. C. 105, the Commission had under investigation the rates on grain and grain products throughout the country upon petitions seeking a horizontal reduction of such rates. The Commission said in conclusion:

"For the sake of clarity we add that our conclusion is not based upon the sole ground that the carriers as a whole

in the western district are not making their fair return. That is only one of the considerations. Still less do we consider that when the rates assailed are shown to be unreasonable the Commission's hands are bound so tightly by the provisions of section 15a of the Interstate Commerce Act that we cannot grant any general reduction of the nature before us unless and until the interested carriers as a whole in their respective groups make a fair return.

"The present rate structure is largely the result of commercial and transportation conditions, and under it the [fol. 668] trade and commerce of the country have grown up. Any material disturbance therein will have a tendency to cause disruption of business conditions generally to the detriment of an orderly conduct of commerce and with possibly serious effects upon large sums of invested capital and upon the steady employment of labor. Any marked readjustment might mean the moving of industrials from points now near the source of supply of raw materials to points farther distant. A revision involves an undertaking of magnitude and requires a large expenditure of funds not at present at our disposal. Many of the rates here assailed were prescribed by us, and, over a long period of time, we have been constantly engaged in readjusting and prescribing rate schedules on these and many other commodities. Since the act to regulate commerce was enacted, and probably during a much longer time, traffic conditions and commercial conditions have been adjusting themselves to the existing relation of rates. It is not enough that the present conditions may not be ideal; it must appear that something better is attainable" (pp. 164-165).

The instant proceeding before the Commission is the first investigation of any kind whatsoever undertaken by the Commission since its creation in 1887 wherein it went into the entire rate structure on grain and grain products in the Western District, inquiring both into the question of the general level of the rates and the innumerable relationships of individual rates.

VI

Interveners admit Congress adopted a joint resolution generally known as the "Hoch-Smith Resolution" (43 Stat. L. 801) which is set out in plaintiffs' Bill of Complaint.

[fol. 669] VII

(a) Interveners further answering say that they admit the general level of rates now in effect, which will be reduced if the order in the present proceeding shall become effective, is the same as the general level of the rates following the decisions in Reduced Rates, 1922, 68 I. C. C. 676; Rates on Grain, Grain Products and Hay, 64 I. C. C. 85; Rates on Grain, Grain Products, and Hay, 80 I. C. C. 362; Kansas Public Utilities Commission v. A. T. & S. F. Ry. Co., 83 I. C. C. 105; and Rates and Charges on Grain and Grain Products, 91 I. C. C. 105.

(b) It is not alleged in the petition that material changes have not occurred since the said decision but it is alleged that "Neither the Report nor the Supplemental Report contains any findings of any material changes in the pertinent facts since the said cases were decided warranting said reversal."

Interveners deny that there have not been any material changes in conditions and allege that petitioners' traffic has increased since that time, that operating expenses have been greatly reduced, and that the rate of return has been more favorable, as is evidenced in the record of the case before the Commission. The petitioners refer to the rate of return received by the carriers in 1927, which was the last year for which figures were available at the time of the close of the record, showing the same to be 3.92 per cent upon the investment of the carriers in railway property, as contrasted with 3.96 per cent in 1923 and 3.87 per cent in 1924. On page 627 of the report of the Commission the rate of return for the Western District appears as follows:

[fol. 670]

	Per cent
1921	3.12
1922	3.45
1923	3.96
1924	3.87
1925	4.13
1926	4.45
1927	3.92
1928	4.35

(c) Interveners allege that they have no information and knowledge as to the average reduction in rates on grain and grain products which would result from the Commission's report and order nor the average reduction in petitioners' revenue which would result therefrom.

Interveners further state that in the process of adjusting and readjusting freight rates, which is continually being carried on by the Interstate Commerce Commission, various and important increases in rates and increases in the petitioners' freight revenue have from time to time been authorized by the Commission. In Western Trunk Line Class Rates, 164 I. C. C. 1, decided May 6, 1930, the Commission authorized a readjustment of the merchandise class rates of petitioners and other carriers, resulting in substantial increase in revenues. Commissioner Porter, in a dissenting opinion in said case (164 I. C. C. 1, 232), stated that the annual increase in freight revenues estimated to result from the said revision of rates would be approximately $12,000,000.

The joint resolution of Congress, known as the Hoch-Smith Resolution, 43 Stat. L. 801 (Paragraph VI of the Bill of Complaint), directs the Commission to undertake an investigation of the rate structure of the country "in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, [fol. 671] unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage, as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities" et cetera. Pursuant to the said resolution the Commission on March 12, 1925, made and entered its order instituting such an investigation into the rate structure of the United States (Exhibit A attached to the Bill of Complaint) and provided therein that among other things the said investigation was instituted to determine to what extent and in what manner rates on the various classes and kinds of commodities and the various classes of traffic may be unjust, unreasonable, unjustly discriminatory, unduly preferential, or otherwise in violation of law, and to make in accordance with law such changes, adjustments, and redistribution of rates as may be necessary to correct any defects so found to exist and to determine to what extent, if any, and upon what

classes and kinds of commodities or classes of traffic, if any, compensating increases or other changes in rates may and shall lawfully be authorized in order to offset or partially offset such reductions or other changes in rates. The Commission at the same time issued its notice to the public (Exhibit B attached to the Bill of Complaint) explaining its action. In said notice it stated that necessary or appropriate decisions and orders may be made in the progress of the investigation and called attention to the fact that the said Resolution requires the Commission with the least practicable delay to make such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers, et cetera.

So huge was the task imposed upon the Commission by the Hoch-Smith Resolution that it was physically impos- [fol. 672] sible to undertake the revision of the entire rate structure in one proceeding, and it was recognized that the investigation, as a practical matter, must needs be handled in parts. The Commission, accordingly, from time to time designated different parts of the rate structure and up to the present time has set down the following parts for investigation:

Part I. (Also designated Ex Parte 87): a general investigation into the revenues of carriers in the Western District.

Part II. Western Trunk Line Class Rates, 164 I. C. C. 1: an investigation into the class rate structure of Western Trunk Line carriers.

Part III: an investigation into the rates on cotton.

Parts IV, and IVa: an investigation into the rates on petroleum and its products.

Part V: an investigation into the rates on furniture.

Part VI: an investigation into the rates on iron and steel articles in Official Classification territory.

Part VII: the instant case, being an investigation into the rates on grain and grain products within the Western District and for export.

Part VIII: an investigation into the rates on cotton seed product and related articles.

Part IX: an investigation into the rates on livestock in the Western District.

Part X: an investigation into the rates on hay.

Part XI: an investigation into the rates on sand and gravel in southwestern territory.

Part XIa: an investigation into the rates on sand and gravel in Kansas and Missouri.

Part XII: an investigation into the rates on non-ferrous metals.

Part XIII: an investigation into the rates on salt.

Decisions have been rendered in the aforesaid investi- [fol. 673] gations as follows: Parts I, II, III, IV, VI, VII, VIII, and XI.

Other parts are still pending before the Commission as follows: Parts V, IX, X, XIa, XII, and XIII.

All the parts heretofore ordered comprise in all only a portion of the entire rate structure of the United States or of the Western District thereof. Therefore the instant case is properly but a portion of a continuing investigation in which the Commission is proceeding with the examination of the various parts of the entire rate structure. It will be necessary in the course of the investigation to make many changes in the distribution of the transportation burden, and it is to be expected that some of these changes will result in increases in revenues, others in decreases.

Interveners therefore say that the Commission is directed by law to undertake a complete investigation of the freight rate structure of the country; that it is only practicable to do this by taking a section at a time; that the Commission must proceed with each section to hearing, argument, and decision as rapidly as possible; that in setting down the various parts the Commission cannot tell in advance whether any such investigation will result in increases or reductions in revenue; and that the courts should not strike down the result of the Commission's work because it finds in any such investigation as to a particular commodity or a particular section of the country that the rates are unjust and unreasonable and reductions in the carriers' revenues must follow.

[fol. 674] VIII

(a) (b) (c) (d) Interveners further say that they admit that consideration of the instant case was under way prior to the decision of the Supreme Court of the United States in Ann Arbor Railroad Co. v. U. S., 281 U. S. 658, June 2,

1930, but state that one month elapsed between the handing down of the decision of the Supreme Court in the last above mentioned case and the date on which the Commission handed down its decision in the instant case, so that no reason exists for petitioners to say that the Commission's decision and report was not made in conformity with that by the Supreme Court and based upon rules of law laid down by the Supreme Court and in conformity therewith; and interveners further say that the decision and order of the Commission was in direct conformity with the decision of the Supreme Court and not in any way in contravention or antagonistic thereto.

(e) Petitioners further deny that the report lacks basic and essential findings necessary to support the order under the Interstate Commerce Act and that "None of the facts recited in the report and to which the Commission gave consideration are sufficient for any finding"; that the decision fails to respond to customary tests under the Interstate Commerce Act, or that there is ground for contending that the Commission was influenced and governed by the Hoch-Smith Resolution. On the contrary, the Commission expressly stated on page 661 of its report:

"The Supreme Court of the United States recently interpreted the Hoch-Smith Resolution as setting up no standard of reasonableness of rate level or relation other than that already provided by the Interstate Commerce Act. Ann Arbor Railroad Company v. United States, [fol. 675] supra, decided June 2, 1930. The findings herein are under the provisions of the Interstate Commerce Act."

Interveners state that the record in the instant case, consisting of more than 53,000 pages of transcript, 2,100 exhibits and 20,000 pages of written argument, was one of the largest records ever asembled in any investigation undertaken by the Interstate Commerce Commission and that the said record contains facts amply supporting the decision of the Commission under the Interstate Commerce Act.

IX

Petitioners state that the present rates on grain and grain products in the Western District have been largely prescribed or reviewed by the Commission and that the

reductions required by the report and order of the Commission are made without any finding of any changed condition and without any recital of facts sufficient to warrant the conclusion that the said rates theretofore approved or prescribed as reasonable had become or would be for the future unreasonable under the standards of the Interstate Commerce Act. Interveners admit that many parts of the grain rate structure had been previously reviewed by the Commission in formal cases wherein were involved considerations of the reasonableness of specific rate levels or of particular relationships of rates but state that the grain rate structure of the Western District as a whole had never previously been before the Commission for review to the extent that it was involved and presented in the instant case. The cases theretofore considered by the Commission were of two distinct kinds: (1) those such as referred to in Paragraph V of the Bill of Complaint, wherein were involved the question of horizontal increases or reductions, or (2) cases involving the reasonableness of rates within [fol. 675½] a particular subdivision of the general territory or relationships of rates as between localities. For the first time in its history the Commission in the instant case had before it the rate structure on grain as an entirety and for the first time dealt in one proceeding with (1) the question of the general rate level, (2) the rate level of the recognized subdivisions of the Western District, and (3) the relationships of grain rates one to another. The issues and the record in the instant case set it apart as something distinct from all the cases which had preceded it. The record was far more complete and a thorough overhauling of the grain rate structure was in accord with and in obedience to the mandate from Congress embodied in the Hoch-Smith Resolution.

Petitioners further refer to certain rates prescribed in the report and order known as "proportional rates," which are lower than either the existing local rates between the same points or the local rates prescribed as reasonable in the order. Said proportional rates are of the kind defined by the Commission in Kansas City Transportation Bureau v. St. L. & S.-F. Ry., 16 I. C. C. 195, as follows: "Proportional rates, if they mean anything at all, are parts of or proportions of other rates," and are further described by the Commission in the report herein at page 633 as follows:

"A proportional rate is a local or joint rate dependent for application upon (1) a previous transportation to the point from which the proportional rate applies; (2) a subsequent transportation from the point to which the proportional rate applies; (3) or both. It is supposed to be a part of a through rate and is usually lower than the flat rate between the same points. When dependent upon previous inbound transportation it is applicable only upon surrender of the inbound paid freight bill showing the transportation of the shipment inbound." Proportional rates are, therefore, [fol. 676] parts of or proportions of other rates. As such, it is to be expected that any general reduction of grain rates will carry with it correspondingly reduced proportional rates, as otherwise the proportional rates would lose their character as parts of the through rates.

It is further alleged by petitioners that the proportional rates prescribed by the Commission are upon the average approximately 70 per cent of the proportional rates now in effect. Thus it appears that the average percentage reduction of the proportional rates is 30 per cent as compared to the average reduction of the general rate structure of 13 per cent, as stated in Paragraph VII of the Bill of Complaint. Interveners state that many of the proportional rates now in effect are out of proportion to the existing body of through rates, and to return them to a proper relationship as parts of through rates requires a greater reduction in said rates than in the general body of rates. These proportional rates, in many instances, alternate with the balances of through rates and the proportional rate or the balance is used, whichever makes the lower. At page 639 of the report herein the Commission recognized this.

"It will be seen that, because of overhead through rates, less than the rate-break combinations, the proportional rates from and between the primary markets have come largely into a state of disuse."

In reducing these proportional rates the Commission did not reduce the going rate by an average of 30% but by a substantially lesser amount.

The proportional rates from Omaha and Kansas City to Chicago are referred to by petitioners, citing Railroad Commissioners of the State of Iowa v. Director General, 63 I. C.

C. 405, as holding that the rate of 15 cents formerly in effect was made as a result of carrier competition and to be on a basis lower than would otherwise have been justified. [fol. 677] Said case was decided in the light of the conditions then prevailing, in particular a higher general level of through rates than is provided in the Commission's report and order herein. The reduced level ordered herein necessarily must contemplate a lower proportional rate as a matter of proper relationship.

Interveners have no information that the rates from Omaha and Kansas City to St. Louis are made in direct relation to the proportional rates to Chicago, but assert that the proportional rates to St. Louis prescribed by the Commission herein are necessary and proper as a part of the main body of rates to St. Louis.

Reference is also made by petitioners to the proportional rate from Kansas City to Memphis, which, it is stated, was approved by the Commission in Board of Trade of Kansas City v. A. W. Ry., 102 I. C. C. 285. Interveners understand from the Commission's report in said proceeding that the issue primarily was one of relationship between Omaha and Kansas City and that the decision of the Commission was only to the effect that no change in the then existing relationship was justified upon the record then made.

The rates from St. Louis to Little Rock are further pointed out by petitioners as prescribed in Arkansas Manufacturers & Jobbers Association v. Director General, 59 I. C. C. 662, as a just, reasonable, and non-prejudicial minimum proportional rate.

In the said case the Commission was dealing, upon a limited record, with rates to Arkansas destinations only, and the rates prescribed were necessarily made in relation to the rates to other points in the same general territory. In the instant case the Commission had the entire territory under review and was able to determine the lawful rates accordingly. Interveners deny that the rates prescribed in [fol. 678] the Arkansas Jobbers and Manufacturers Association cases referred to had the effect of reducing rates to points in Texas and Louisiana but assert on the contrary that the rates to Arkansas there prescribed by the Commission were made in view of the existing rates to said territories.

Reference is also made to the proportional rate from St. Louis to New Orleans. Interveners assert that the rate of 19 cents prescribed by the Commission cannot be considered unreasonable in view of the fact that petitioners voluntarily established and now maintain a rate of 11 cents per hundred pounds for application from St. Louis to New Orleans upon the same traffic when for export.

The proportional rate from Minneapolis to Chicago, also referred to, is in harmony with the main body of rates prescribed by the Commission in the report and order, and the decision in the Chamber of Commerce of Milwaukee case made in the light of the conditions then prevailing, particularly in view of the higher general rate level condemned as unreasonable in the report and order.

In Oklahoma Millers' League v. A. M. R. R., 128 I. C. C. 523, referred to in the Bill of Complaint, the Commission had before it the rates on grain and grain products from Oklahoma points to Louisiana points and prescribed rates as reasonable which corresponded closely to rates theretofore prescribed by the Commission for application from points in Oklahoma to points in Texas, but the Commission in said cases did not have before it the ample record provided in the instant case and was dealing with but one part of the Western District. The fact that the rates now prescribed for the same transportation are somewhat less than those prescribed in the said cases, cannot be taken [fol. 679] as any indication of the reasonableness of the Commission's action in the instant case.

The interveners further state that the Interstate Commerce Commission has been in existence since 1887, and in said period has dealt with more than 25,000 cases involving investigations of freight rates and in many instances has been required to review the same rate or set of rates more than once; that the Commission's regulation of freight rates under the Interstate Commerce Act is necessarily a continuing process and its action in any instance is by law governed by the record then before it; that changing economic conditions and other causes require changes in rates formerly prescribed by the Commission; and that the Commission, not being bound by the doctrines of res adjudicata or stare decisis, is not only free to, but is by law bound to, consider and determine the issues presented to it in the

light of the record at the time under consideration and in view of the changed conditions which such a record may present.

X

Interveners further answer and say that they deny that the interpretation placed upon the Hoch-Smith Resolution and upon provisions of the Interstate Commerce Act by the Commission in determining the issues in the instant case are in contravention of the Fifth Amendment to the Constitution of the United States as to render said resolution and provisions unconstitutional and void.

[fol. 680] XI

Your interveners further answering deny that the matters and things referred to in Paragraph XI of the petitioner's Bill of Complaint are not in the record before the Commission and deny that the Commission gave consideration to matters outside said record.

XII

Interveners further asnwering say that the petitioners set forth a statement by the Commission on page 698 of the report as follows: "We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation. We say this especially in the light of increased revenues or revenues granted in certain other cases and in the realization that a failure of the present revision to afford adequate revenues will prompt further proceedings." Petitioners state that the Commission thus took into consideration as an essential factor in making its decision that any error in the decision would probably be cured as the result of an effort to institute new proceedings and that thereby the Commission dealt with property rights upon an insufficient finding of fact constituting an abuse of administrative discretion.

Interveners further say that the inclusion of the language referred to in no wise affects the Commission's action in this case; that it indicates a desire upon the part of the Commission out of an excess of caution to avoid any unwarranted reduction in revenues; but whether such language be included in the decision and report by the Commission or not is immaterial and incompetent because the

Commission must always be aware that the carriers have [fol. 681] the right to initiate new proceedings at any time to correct any improperly low level of rates.

XIII

Petitioners in their Bill of Complaint allege that they filed a petition with the Interstate Commerce Commission seeking a rehearing and reconsideration of the order, which petition was denied by the Commission; that said petition for rehearing dealt mainly with alleged changes in conditions which have occurred subsequent to the conclusion of the record in the case and charged that the action of the Commission in denying said petition for a rehearing was in disregard and in violation of the duties imposed upon it by the Interstate Commerce Act and constitute an abuse of administrative discretion in excess of the authority conferred upon it by law and in denying to the carriers a rehearing constituted a denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States.

Interveners say that duties conferred and the powers imposed upon the Commission by the Interstate Commerce Act are of a continuing character. The revenues of the petitioners are affected not by the instant case alone but also in many other cases closed and pending. There are at all times numerous cases before the Commission, the disposition of which have an effect, one way or another, upon petitioners' revenues. They are and must be dealt with by the Commission in the light of the conditions at the time prevailing as disclosed by the record and they must be disposed of in accordance with the record. It manifestly would not be feasible to reopen such cases with every change in economic conditions. Litigation should and must [fol. 682] come to an end some time, and there would be no end if the Commission were required to reopen and reconsider every case with every change in conditions or upon the whim of a carrier, nor would a rule to such effect be satisfactory to the petitioners in times of rising railroad revenues. Each case should be considered by the Commission upon its own merits and a decision rendered within such time as the Commission, through proper diligence and effort, might be able to reach its conclusions and judgments.

XIV

Your interveners say that they deny there is any evidence, direct or indirect, which bears out the assertion and claim of the petitioners that the Commission acted in an arbitrary and unreasonable manner in deciding the case or entering its order.

XV

Interveners say that the petitioners allege that the order requires the carriers to put the prescribed rates into effect on or before June 1, 1931, upon not less than 15 days filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act, and that by reason of the penalties prescribed in said Act irreparable injury will ensue to petitioners unless the enforcement, operation, and execution of the order is restrained and suspended during the pendency of this proceeding. The report and order of the Commission was made and entered on July 1, 1930, with provision requiring the carriers to establish the prescribed rates on or before October 1, 1930. Postponements of the effective date of the order have been made from time to time at the request of the petitioners and by them only, and the rates are now required to be made effective June [fol. 683] 1, 1931, as stated. Petitioners have had ample time since the report and order were made and entered to seek the relief now prayed for in this court without the extraordinary remedy of a restraining order. The facts averred in the petition have been well known to them since said July 1, 1930, and they were at all times in position to seek this relief. Such action could have been taken by them at a time more suitable to the interest of the shipping public. The public is entitled to the benefit of the reduced rates prescribed by the Commission at the earliest practicable date. The effective date of June 1, 1931, is a most satisfactory one from the interest of the public. The harvest of winter wheat will shortly be under way, and the movement over the rails will commence in the month of June, 1931. To restrain the operation of the order as sought by the petitioners would deny to producers and others the benefit of the reduced rates in connection with the movement of this year's harvest. It would cause grain

to be bought and sold on the basis of the present rates with the uncertainty of the final application of rates dependent upon the action of this court, and would thereby jeopardize the trade in grain and result to the injury of producers because of the uncertainty. Interveners further state that in view of the opportunity the carriers have had for months past to commence their suit, and the impending movement of the new crop of wheat, it would be inequitable to allow petitioners a restraining order. Under the provisions of Section 208 of the Judicial Code the pendency of actions to set aside orders of the Commission shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission. The order of the Commission should be allowed to take effect, and the suit proceed to an orderly [fol. 684] determination as one to set aside the order of the Commission but with no relief of an interlocutory or temporary nature.

Wherefore interveners pray that the prayer of the petition be denied and that the said petition be dismissed for lack of jurisdiction and want of equity;

That the interveners may have such other and further relief in the premises as in equity and good conscience they may be entitled to and for their cost.

Charles W. Steiger, Solicitor for Interveners, Topeka, Kansas. Charles W. Steiger.

[fols. 685-688] *Duly sworn to by J. W. Scott. Jurat omitted in printing.*

[fol. 689] In United States District Court

In Equity. No. 10479

[Title omitted]

Answer of Nebraska State Railway Commission, Intervening Defendant—Filed May 7, 1931

[fol. 690] The Nebraska State Railway Commission having been permitted to intervene herein as a defendant, in answer to the petition of the complainants, alleges:

I

Admits the allegations of Paragraph I of the petition.

II

Admits that on March 12, 1925, the Interstate Commerce Commission entered an order instituting Docket No. 17,000 Rate Structure Investigation and a statement to the public, copies of which are attached to the petition as Exhibits A and B, respectively; that thereafter the Commission divided Rate Structure Investigation into separate parts and that part VII relating to Grain and Grain Products within Western District and for Export, is one of such parts; that the Western District is correctly described and that certain other cases were consolidated with the Rate Structure Investigation; that an order was entered therein on July 1, 1930, and a supplemental order therein on or about April 15, 1931; that the effective date of the order of July 1, 1930, has been postponed and is now to become effective on June 1, 1931.

This intervener denies, however, that the several parts of said Rate Structure Investigation became separate cases but alleges that each part thereof continued a branch of said Rate Structure Investigation. For full and complete information this intervener refers the Court to the order itself.

III

Admits the allegations of paragraph III.

IV

Admits that the cases referred to, to-wit: Increased Rates 1920—58 I. C. C. 220; Rates on Grain, Grain Products [fol. 691] and Hay 64 I. C. C. 85; Reduced Rates 1922—68 I. C. C. 676 were decided by the Interstate Commerce Commission but denies that the same are relevant to the issues in this case. Denies that the Interstate Commerce Commission made a special report dated January 21, 1931, but alleges that said document was sent by the Chairman of the Legislative Committee of the Interstate Commerce Committee of the United States Senate.

Denies that the carriers in the Western District have never since the passage of the Transportation Act received the rate of return contemplated by Section 15 A of the Interstate Commerce Act as amended thereby. Alleges that on a proper valuation a number of carriers have received such return but admits that some carriers *that* have not received such return.

V

Admits that the Interstate Commerce Commission determined rates on Grain, Grain Products and Hay 80 I. C. C. 362 on June 4, 1923 and determined Kansas Public Utility Commission vs. A. T. and S. F. Railway Company 83 I. C. C. 105 on October 11, 1923, and thereafter determined rates and charges of Grain and Grain Products 91 I. C. C. 105 but alleges that none of said cases is an adjudication of any of the matters or issues in the present proceeding and that each of them is irrelevant in this case.

VI

Admits the adoption by Congress of the Hoch-Smith Resolution.

VII

Admits that the general effect of the order entered July 1, 1930, will be to reduce rates for the transportation of grain and grain products; denies that the average reduc- [fol. 692] tion in rates is approximately 13% and alleges that the general reduction will be a far smaller percentage; denies that the rates prescribed in the order will cause a reduction of $20,000,000.00 annually in the gross revenues and in the net railway operating income of the carriers in the Western District but alleges that the net reduction that will result from the application of the rates prescribed in said order will be far less than $20,000,000.00, the exact amount being impossible to estimate owing to the numerous increases and the numerous reductions in the rates and the large amount of free transit service that will be cut off by the terms of said order; denies specifically that the Interstate Commerce Commission in drafting said order misinterpreted or misconstrued Section 15 A of the Interstate Commerce Act.

VIII

Admits that throughout the proceedings before the Interstate Commerce Commisison the Hoch-Smith Resolution was frequently referred to; denies that the Hoch-Smith Resolution, however, influenced the Commission in rendering its decision and alleges that after the decision in Ann Arbor Railroad Company v. 281 United States 658, the resolution was not given further consideration or effect by the Commission. Admits that on June 25, 1925, the Interstate Commerce Commission entered its order in California Growers' and Shippers' Protective League vs. Southern Pacific Company 100 I. C. C. 79 was determined by the Interstate Commerce Commission; that the order was sustained by the District Court of the United States for the Northern District of California and that the case was reversed in the Supreme Court of the United States (281 U. S. 58) and alleges that thereafter the Interstate Commerce Commission in all respects followed the decision [fol. 693] of the Supreme Court of the United States; denies specifically that the report is not based upon the facts contained in the record before the Intertsate Commerce Commission and alleges that the Commission gave full force and effect to the evidence before it and that the order of July 1, 1930, is fully sustained by the evidence.

IX

Admits that the present rates on Grain and Grain Products in the Western District have been largely prescribed or reviewed by the Interstate Commerce Commission; that the order of July 1, 1930, requires the reduction of some of said rates and alleges that many of said reductions are fully compensated by increases in the rates. Admits that the Interstate Commerce Commission entered orders in Ogden Grain Exchange vs. Arizona Eastern Railroad Company 126 I. C. C. 255, 128 I. C. C. 490 and 132 I. C. C. 46 and in the other cases specified in paragraph IX of the petition, and alleges that none of said cases is an adjudication of the matters or issues in the present proceedings. And further answering, states that as to the history of grain rates set forth in said paragraph, this answering defendant has not sufficient information on which to base his allegations and therefore denies each and every allegation therein.

X

Denies the allegations of paragraph X.

XI

Denies that it appears from pages 697 and 698 of the report that the Interstate Commerce Commission took into consideration anything outside of the record and alleges that the checks and estimates referred to therein were properly made in connection with the evidence before the [fol. 694] Commission and further alleges that the proceedings referred to on page 698 refer to certain increases in rates in other parts of I. C. C. Docket 17,000 Rate Structure Investigation and particularly part II thereof, Western Trunk Line class rates, in which very large increases in rates were allowed, which increases will more than compensate for the net loss of revenue due to reduction on grain rates as provided in the order of July 1, 1930. Alleges that the complete results of operation of Western District carriers were not complete at the time that the evidence in part VII was closed but alleges that reference was made to the full returns for the year 1928 at the time of the argument and that certain figures were used thereat to which no objection was made by any party to this proceeding.

XII

Admits that the Interstate Commerce Commission in its order used the language quoted in paragraph XII of the petition; denies that the further proceedings therein mentioned refer to further hearings but alleges that the Interstate Commerce Commission considered at all times that part VII would not be finally concluded until the Commission had had an opportunity to equalize as among the various commodities treated in the several parts of Docket 17,000, said Docket 17,000 being at all times regarded by the Commission as a single proceeding. The "further proceedings" referred to other parts of Docket 17,000.

XIII

Admits the filing of the several petitions by the carriers as set forth in paragraph XIII of the petition but denies

that any of said petitions and the orders given therein affect the validity of the order entered July 1, 1925.

[fol. 695] XIV

Denies the allegations of paragraph XIV.

XV

Admits that the prescribed rates will go into effect June 1, 1931, denies that unless the enforcement of said order is restrained irreparable injury will enure to the petitioners.

Wherefore this defendant prays that the action of the petitioners may be dismissed.

C. A. Sorensen, Hugh LaMaster, Solicitors for Intervener, State Capitol, Lincoln, Nebraska.

[fol. 696] And on, to wit, the 1st day of May, 1931, came the Terminal Grain Co. et al., by their attorneys, and filed in the Clerk's office of said Court their certain Petition as Cause No. 10482, in words and figures following, to wit:

IN THE

District Court of the United States

For the Eastern Division of the Northern District of Illinois

---

TERMINAL GRAIN COMPANY *et al.*, *Petitioners*, vs. THE UNITED STATES OF AMERICA, *Defendant*.	IN EQUITY, No._____

PETITION

To the Honorable Judge of the District Court of the United States for the Eastern Division of the Northern District of Illinois:

The petitioners named in Paragraph 1 hereof file this, their petition, against the United States of America to enjoin, suspend, set aside and annul certain orders, hereinafter set forth, of the Interstate Commerce Commission (herein called the "Commission"), which is a commission existing under and by virtue of the Interstate Commerce Act. Your petitioners complain and say:

I.

PETITIONERS DESCRIBED

Terminal Grain Company is a corporation organized and existing under the laws of the State of Texas with principal office and place of business in Fort Worth, Tarrant County, Texas, engaged in buying, storing and selling grain and the products thereof and in the manufacture and sale of feed. W. W. Manning is its president.

Morten Milling Company is a corporation organized and existing under the laws of the State of Texas with principal office and place of business in Dallas, Dallas County, Texas, engaged in the purchase, storage and milling of grain and the sale of the products thereof. Fred Honea is its president.

Stanard-Tilton Milling Company is a corporation organized and existing under the laws of the State of Missouri, with a permit to do business in the State of Texas, with principal office and place of business in St. Louis City, Missouri, engaged in the purchase, storage and milling of grain and the sale of the products thereof at St. Louis, Mo., and Dallas, Texas. W. K. Stanard is its president.

Universal Mills is a corporation organized and existing under the laws of the State of Texas with principal of-

fice and place of business in Fort Worth, Tarrant County, Texas, engaged in the purchase, storage and milling of grain and the sale of the products thereof; also the manufacture and sale of mixed or blended feeds. Gaylord J. Stone is its president.

The four petitioners heretofore named purchase large quantities of grain throughout the producing territories in the States of Colorado, Illinois, Iowa, Kansas, Missouri, Nebraska and Oklahoma, ship such grain to their plants and elevators, there mill, manufacture and/or sell the grain or the products thereof and ship to various destinations in the States of Arkansas, Louisiana, Texas and states east of the Mississippi River; they were engaged in that business on July 1, 1930, and have been so engaged for a number of years prior thereto.

There are numerous other individuals, firms and corporations, operating elevators, mills and factories in the State of Texas, engaged in the same kinds of business, and this petition is filed by the petitioners heretofore named for and on behalf of themselves and all other individuals, firms and corporations in the State of Texas, similarly located and engaged.

II.

JURISDICTION

This is a suit to enjoin, suspend, set aside and annul an order as set forth in Appendix "A", issued by the Inter-

state Commerce Commission in a proceeding instituted on its own motion and not on petition by any party. The proceeding involved in part transportation from and to points within the Northern District of Illinois and this Court has full and complete jurisdiction to hear and determine this suit under the provisions of Title 28, Sec. 43 and Sec. 46, U. S. C. A.

III.

THE COMMISSION'S ORDER

Petitioners allege that on July 1, 1930, and April 10, 1930, the Interstate Commerce Commission issued its report and order in Docket 17000, Part VII, a true copy of which is attached hereto, marked "Exhibit A" and made a part hereof as fully and completely as if incorporated herein; that said report and order, among other things,

(a) Will materially reduce the domestic rates on wheat and the products thereof below bases heretofore found and prescribed as reasonable bases for application within the same territory.

(b) Prescribed rates on domestic flour on the same basis as prescribed on wheat though the record shows that the transportation characteristics of flour justify higher rates than on wheat.

(c) Prescribed domestic rates to and from Kansas City, Omaha and St. Louis which are material-

ly less than the rates found and prescribed as reasonable rates for general application within the same territory.

That said order will apply in connection with the transportation of all commodities referred to in Paragraph I received and shipped by petitioners. The effective date of the foregoing order has been postponed by the Commission from time to time and it is scheduled to become effective June 1, 1931, but the railroads are now compiling tariffs in compliance with said order and they will be published and filed with the Commission during May, 1931, unless the order is enjoined.

IV.

ORDER BASED ON IMPROPER CONSTRUCTION OF JOINT RESOLUTION BY CONGRESS

Petitioners allege that the order complained of in Paragraph III hereof is the result of an investigation instituted by the Commission on its own motion in compliance with *Joint Resolution No. 46, 68th Congress, Title 46, Sec. 55, U. S. C. A.*, which directed the Commission to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act and to

make with the least practicable delay such lawful changes in the rate structure of the country as would promote the freedom of movement by common carriers of the products of agriculture, affected by the depression existing at the time the joint resolution was adopted (1925), at the lowest possible rates compatible with the maintenance of adequate transportation.

It is alleged that the rates prescribed by the Commission in the order complained of are substantially lower than ever before found reasonable by the Commission for application within this general territory and that said decision and order prescribing such lower rates were based on a misconstruction of *Joint Resolution No. 46*, in that the Commission construed this resolution as directing and requiring it to prescribe rates on the products of agriculture on a basis much lower than that required by law prior to the adoption of said resolution.

Below is a brief statement of comparative rates for representative distances showing in Col. (a) the rates previously found reasonable by the Commission for application in the *Southwest Oklahoma Millers' League vs. A & M Railroad Company, 128 I. C. C. 523*, and in Col. (b) the rates prescribed for application within the same territory in the order complained of:

Rates on Wheat, Carloads, in Cents per 100 lbs.

Distance—Miles	*Col. (a)*	*Col. (b)*
50	12	9½
100	16	13½
150	19	15½
200	22	18
250	25	20
300	27	22½
350	29	24
400	31	26
450	33	28
500	35	29½
550	37	31½
600	38	33½
700	42	37
800	45	40½

Your petitioners show to the Court that the resolution referred to did not set up any standard of reasonableness other than that already provided by the law under which the previous reasonable bases were prescribed and that the Commission's order was based upon an erroneous construction of the resolution and should be set aside. While the Commission stated at page 661 of its report (Appendix "A") that the findings therein were under the provisions of the interstate commerce act, it is evident from consideration of the entire report that the low bases prescribed therein were the result of the same construction of the joint resolution as was condemned in *Ann Arbor Railroad Co. vs. United States*, 281 U. S. 658.

V.

COMMISSION ACTED ARBITRARILY AND WITHOUT REGARD FOR FACTS DEVELOPED

It is alleged that the Commission prescribed as reasonable rates on domestic flour, carloads, the same rates as found reasonable for application on domestic wheat, carloads, and that this action was arbitrary and utterly disregarded the facts developed in the investigation. The Commission stated at page 652 of the report (Appendix "A"):

> "From the standpoint of relative loadings, values and general transportation characteristics the propriety of this equalization might be questionable."

The record clearly shows that domestic flour loads much lighter than wheat, that its value and transportation hazard are greater, that the cost of service in connecion with flour is greater than in connection with wheat, and that the general transportation characteristics justify higher rates on flour than on wheat. This is inferentially admitted by the Commission but regardless of the record and its admission it proceeded arbitrarily to prescribe the same rates on domestic flour as on wheat.

VI.

COMMISSION EXERCISED ITS POWER IN AN UNREASONABLE AND ARBITRARY MANNER

It is alleged that the Commission prescribed a reasonable basis of rates for general application throughout this general territory and then proceeded to prescribe specific rates to apply to and from Kansas City which are substantially lower than the general basis found to be reasonable. As illustrative, we show below the specific rates prescribed from certain origin points to Kansas City, Mo., compared with rates that would apply if the general basis found reasonable were applied.

Rates in Cents per 100 pounds, to Kansas City:

From	*Specific Prescribed*	*Reasonable Basis*
Stratford, Texas	24	29
Liberal, Kansas	20	24
Dodge City, Kansas	18	21½
Elkhart, Kansas	22	26
Satanta, Kansas	18	23½

It is further alleged that the Commission prescribed proportional rates to apply on grain and grain products from Kansas City, Mo., Omaha, Neb., and St. Louis, Mo., to various points in the Southwest, which are substan-

tially lower than the basis of rates prescribed as reasonable for general application throughout this territory. As illustrative, we show below the proportional rates prescribed from Kansas City and St. Louis, Mo., to Texas Group 1, compared with the rates prescribed as reasonable specific rates, and the reasonable specific rates shown are lower than would exist if the general mileage basis found reasonable were applied.

Rates in Cents per 100 pounds to Texas Group 1:

From	*Proportional Rates*	*Reasonable Specific Rates*
Kansas City, Mo.	16	30
St. Louis, Mo.	18	32

Petitioners allege that the Commission in prescribing the specific arbitrary rates complained of has exercised its power in such an unreasonable manner as to in fact be beyond the scope of the delegated authority under which the order purports to have been made and such exercise of power will result in rates to and from Kansas City and other markets which are in fact unduly preferential of such markets and unduly prejudicial to petitioners in violation of Section 3 of the interstate commerce act.

VII.

PETITIONERS WILL SUFFER IRREPARABLE DAMAGE

It is alleged that the order complained of will result in the payment of freight rates by petitioners which will preclude their competing with individuals, firms and corporations which are engaged in similar business at Kansas City, Mo., ~~and other similarly located business at Kansas City, Mo.,~~ and other similarly located markets, by reason of which there will be a substantial loss of business by petitioners engaged in the business of milling and marketing grain and grain products, and mixed feed.

It is further alleged that your petitioners can continue business only by securing and holding permanent customers throughout the territory, that these customers have been obtained by intensive advertising and sales campaigns, and that the loss of these customers for only a temporary period will result in substantial losses to petitioners. That because of this fact it is impracticable to give the new rates a trial and appeal to the Commission for modification of the order as suggested therein. Much of this business, if lost to your petitioners, probably could never be recovered even under a revised rate schedule, and such business as could be recoverd would be obtained only after great expense for additional advertising

and sales campaigns. There is no adequate remedy at law by which petitioners may obtain redress for such damages and they will suffer irreparable damage, if the order complained of is not enjoined or set aside before the freight tariffs putting the order into effect are published and filed early in May, 1931.

WHEREFORE, petitioners pray that, upon the filing and presentation of this bill, a temporary or interlocutory injunction suspending, restraining and enjoining the operation of the orders of the Commission herein complained of, be made by the Court after a notice of five days to the Interstate Commerce Commission and the Attorney-General of the United States, because of the irreparable damage which will result to petitioners unless such suspension be made or such temporary or interlocutory injunction be granted; that the Commission be restrained from taking any steps or instituting any proceedings to enforce said orders, pending a hearing on this petition; that upon a hearing of this cause a decree be entered setting aside and annulling said orders and perpetually enjoining and restraining the enforcement of said orders or any part thereof, and that petitioners be

granted such other and further relief as to the Court may seem meet and proper.

TERMINAL GRAIN COMPANY,
STANARD-TILTON MILLING COMPANY,
MORTEN MILLING COMPANY,
UNIVERSAL MILLS,

By DICK DIXON,
FRANK A. LEFFINGWELL,
Attorneys for Petitioners.

Address: LEFFINGWELL & DIXON,
1901 Santa Fe Bldg.,
Dallas, Texas.

AFFIDAVIT

STATE OF TEXAS)
) ss
COUNTY OF TARRANT)

W. W. Manning, being by me duly sworn, upon his oath deposes and says that he is president of the Terminal Grain Company, one of the petitioners in the above-entitled cause; that he is also Chairman of the General Grain Committee appointed by the individuals, firms and corporations doing business in the State of Texas in the purchase, storage, manufacturing and/or marketing of grain, grain products and mixed feed; that he knows the facts stated in the foregoing bill for an injunction; that the statements and matters contained therein are true, and that he is authorized to make this affidavit for and on behalf of all petitioners herein.

_____

Subscribed and sworn to before me this_____ day of April, A. D. 1931.

_____

Notary Public in and for Tarrant County, Texas.

My commission expires_____.

[fols. 712 & 713 & 714] IN UNITED STATES DISTRICT COURT

Equity. No. 10479

Equity. No. 10482

[Title omitted]

MOTION TO CONSOLIDATE—Filed May 7, 1931

To the Honorable Judges of said court:

Come now the Terminal Grain Company and other petitioners named in Docket 10482 and move the Court for an order consolidating the above causes, both of which are now pending in this Court, upon the following gounds:

I

The defendants in the above causes are the same.

II

The alleged offenses charged in each of the above causes are of like nature and grow out of the same transaction.

III

The evidence to be introduced and the witnesses in both causes are substantially the same.

IV

The expenses to the United States and all other parties will be considerably less in case of consolidation of said causes.

V

The time spent in the trial of the above causes will be considerably less in case they are consolidated.

Respectfully submitted, (Signed) Frank A. Leffingwell, Attorney for Petitioners.

Address: 1901 Santa Fe Bldg., Dallas, Texas.

[fols. 715 & 716] IN UNITED STATES DISTRICT COURT

10482

[Title omitted]

ORDER OF CONSOLIDATION—May 7, 1931

On motion of plaintiff's attorney it is ordered that this cause be and the same is hereby consolidated with Equity cause #10479.

[fol. 717] IN UNITED STATES DISTRICT COURT

In Equity. No. 10432

[Title omitted]

ANSWER OF UNITED STATES OF AMERICA—Filed May 29, 1931

United States of America, defendant in the above entitled cause for answer to the petition therein, answers and says:

I

First Defense

(1) United States says the petition, with the exhibits annexed thereto and made a part thereof, is without equity on its face and the facts therein alleged are insufficient to constitute a cause of action against the United States.

(2) United States says petitioners have no standing to maintain this suit and the facts alleged in the petition fail to show that petitioners have a legal right sufficient to entitle them to maintain this suit against the United States under Urgent Deficiencies Act or any other statute.

Wherefore United States moves that the Court dismiss the petition, and prays that an order be entered accordingly.

[fol. 718] II

Second Defense

1

United States admits, for the purpose of this suit, the matters, things and conclusions alleged in the opening par-

agraph and in paragraphs I and II of the petition, with this exception:

It denies that the suit is brought on behalf of any persons, firms or corporations other than those named and described in paragraph I of the petition as parties thereto and petitioners therein.

2

United States admits that the Interstate Commerce Commission made and issued the reports and orders mentioned in paragraph III of the petition, and annexed as Exhibit A thereto; denies that the effect of said reports and orders is either accurately, truthfully, or fully alleged in said paragraph III, and United States respectfully refers the Court to said Exhibit A, hereby referred to and made a part of this answer, for full, true and complete information concerning the matters and things prescribed in and required by said reports and orders, and the effect thereof.

Further answering said paragraph III, United States says that said orders were to become effective on June 1, 1931, but that on May 7, 1930, this Court entered its temporary restraining order, which prevents and restrains the enforcement of said orders for a period of sixty days from May 7, 1930.

[fol. 719]

3

For answer to paragraph IV of the petition United States admits that said orders were made by the Commission at the conclusion of an investigation undertaken and conducted by it pursuant to Joint Resolution No. 46, 68th Congress, but denies that in making and issuing said orders the Commission misconstrued or misapplied said Resolution.

4

Answering paragraphs V and VI of the petition, United States denies that in making and issuing said orders the Commission acted arbitrarily or without regard to facts developed in its said investigation, and denies also that the Commission exercised its power in either an unreasonable or an arbitrary manner, and further denies that the said orders are unlawful or illegal for the reasons alleged in said paragraphs V and VI, or for any other reason.

5

Answering paragraph VII of the petition, United States denies that petitioners will suffer irreparable or any other legal damage as a result of the enforcement of said orders.

6

Further answering the allegations of the petition, United States alleges that said orders are lawful and valid and that in making and issuing them the Commission acted fully within the powers reposed in it by statute;

[fol. 720] And that it neither acted arbitrarily or without regard to facts before it nor exercised its power in an unreasonable or arbitrary manner.

Wherefore, having fully answered, United States prays that the relief prayed in the petition be denied and the petition dismissed at petitioners' costs, and that United States have the benefit of such other and further orders, decrees, or relief as may be just and proper.

Elmer B. Collins, Elmer B. Collins, Special Assistant to the Attorney General. John Lord O'Brian, John Lord O'Brian, Assistant to the Attorney General. George E. Q. Johnson, George E. Q. Johnson, United States Attorney.

[fols. 721 & 722] *Duly sworn to by Elmer B. Collins. Jurat omitted in printing.*

[fol. 723] In United States District Court

In Equity. No. 10482

[Title omitted]

Answer of the Interstate Commerce Commission—Filed May 6, 1931

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, now and at all times hereinafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many er-

rors and insufficiencies in the petitioners' petition contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says

I

That the petitioners have no standing in their own right to attack the order of the Commission. This is settled by the decision of the Supreme Court in Sprunt & Sons v. United States, 281 U. S. 249, decided April 14, 1930.

[fol. 724]

II

Answering paragraphs I to III, inclusive, of the petition, the Commission admits that the allegations therein contained are true, except that the Commission alleges that the work and figures "April 10, 1930" contained in paragraph III should be "April 10, 1931."

III

Answering paragraphs IV to VII, inclusive, of the petition, the Commission admits and alleges that upon its own motion, by an order dated the 12th day of March, 1925, it instituted a proceeding entitled Docket No. 17000, Part VII, Grain and Grain Products within Western District and for Export; that with that proceeding certain other complaint and Investigation and Suspenstion proceedings were consolidated for initial or further hearing; that further hearings were had and thereafter the Commission made, entered and served upon all parties in said proceeding, including the petitioners herein, the report and order of July 1, 1930, 164 I. C. C. 619, made a part of the petition herein as "Exhibit A-Part I" to which the Commission respectfully refers the Court for information concerning its findings and requirements in the premises; that subsequently the Commission made, entered and served upon all the parties in said proceeding, including the petitioners, its Supplemental Report and Order, of April 10, 1931, referred to in the petition as "Exhibit A-Part II," to which the Commission respectfully refers the Court for information concerning its findings and requirements in the premises; that in said proceeding and prior to the making, entering and serving of said reports and orders, the parties thereto,

[fol. 725] including the petitioners herein, were, and each of them was, accorded the full hearing provided for by the Interstate Commerce Act; that in said hearing a great volume of testimony and other evidence bearing upon the matters covered in said reports and orders were submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of petitioners herein by their counsel; that at said hearings and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including the particular questions raised by petitioners in this suit, whereupon the Commission determined said matters and entered and served upon all the parties to said proceeding, including the petitioners herein, its said reports and orders; that said reports and orders included the Commission's findings of fact, decision, conclusions, order and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said reports, the Commission made the findings and stated the conclusions upon which said orders are based.

The Commission further alleges that the findings and conclusions in said reports were and are, and that each of them was and is fully supported and justified by the evidence submitted in said proceeding as aforesaid; that in making said reports and orders it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including all material matters covered [fol. 726] by the allegations of the petition herein; that said orders of July 1, 1930 and April 10, 1931, were not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making said orders the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in the petition.

Further answering paragraphs IV to VII, inclusive, of the petition, the Commission denies that its orders, or either of them, are invalid for any of the reasons set forth in said paragraphs or for any other reason or reasons;

denies that it misapplied or misinterpreted or gave improper or erroneous effect or consideration to the so-called Hoch-Smith Resolution; denies that in making its reports and orders it acted arbitrarily and without regard to the facts developed; denies that it has exercised its power in such an unreasonable manner as to be beyond the scope of its delegated authority; and denies that its order will result in rates to and from Kansas City and other markets which are in fact unduly preferential of such markets and unduly prejudicial to petitioners in violation of Section 3 of the Interstate Commerce Act. The Commission also denies that the effect of said orders will be to deprive petitioners of their property without due process of law or will result in irreparable damage, in violation of Constitutional provisions and guarantees or otherwise.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in said petition, in so far as they conflict either with the [fol. 727] allegations herein, or with the statements or conclusions of fact included in said reports and orders of the Commission, which are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission. Daniel W. Knowlton, E. M. Reidy, H. L. Underwood.

[fols. 728 & 729] *Duly sworn to by Balthasar H. Meyer. Jurat omitted in printing.*

[fol. 730] IN UNITED STATES DISTRICT COURT

In Equity. No. 10479

[Title omitted]

AFFIDAVIT OF L. E. WETTLING—Filed May 6, 1931

STATE OF ILLINOIS,
County of Cook, ss:

L. E. Wettling, being first duly sworn, deposes and says: That he is manager of the Statistical Bureau of the Western Lines, being all of the carriers by rail subject to the

Interstate Commerce Act operating generally between the Pacific Coast and the Mississippi River and Chicago, including the Northern District of Illinois, and as such is in the employ of all the carriers in the Western District, as defined by the Interstate Commerce Commission in the proceeding entitled "No. 17000, Rate Structure Investigation, Part VII, Grain and Grain Products Within Western District and For Export"; 164 I. C. C. 619; that he has acted in this capacity since the institution of such Statistical Bureau in the year 1916; that, as manager of such Statistical Bureau, his duties comprise principally the preparation of statistics and data in connection with rate cases before the Interstate Commerce Commission and the vari- [fol. 731] ous state commissions; that he attended many of the hearings before the Interstate Commerce Commission in the above-entitled proceeding and prepared and submitted oral evidence and exhibits in said proceeding; and that he is familiar in a general way with the grain rate structure of the carriers in the Western District.

Deponent further states that he has made a study of the report and order and the supplemental report and order of the Interstate Commerce Commission in said proceeding, and of the effect thereof upon the revenues of the carriers in said Western District, if said rates, rules and regulations therein prescribed should become effective.

Deponent further states that, as a result of such study, he finds that the reduction in the revenues of the carriers in the Western District, petitioners herein, as a result of the order of the Commission herein complained of, will be approximately $21,980,023 per annum. Deponent further states that such study has been conducted and said findings or estimates of loss have been determined in the following manner;

All the point to point rates prescribed by the Interstate Commerce Commission in Appendix D to said report and order were tabulated and compared by deponent with the present rates between the said points, and the differences in the aggregate of such present rates and prescribed rates on wheat and coarse grain were separately developed by states and groups of states. The number of rates prescribed in said Appendix D were found to be 2,064 for wheat and 2,064 for coarse grain, making a total of 4,128 rates included in the comparison just described.

The following states were grouped into a single territory approximating the territory known as the Western Trunk Line territory, to-wit: Colorado, Iowa, Kansas, Minnesota, [fol. 732] Nebraska, North Dakota, South Dakota and Wisconsin. For these eight states it was found that the average of all the present rates for wheat between the points designated in said Appendix D was 31.34¢ per 100 pounds; for coarse grain 28.22¢ per 100 pounds; that the average of the prescribed rates for both wheat and coarse grain was 26.74¢ per 100 pounds; and that the average net reduction, giving full weight to certain increases found in these rates, was a reduction of 4.60¢ per 100 pounds on wheat and 1.48¢ per 100 pounds on coarse grain; and that, expressed in percentages, the average reductions were equivalent to 14.68% of the rates on wheat and to 5.23% on the rates on coarse grain.

For the states of Missouri, Oklahoma and Texas, the principal grain producing states in the Southwestern Territory, the average of all the present rates between the points designated in Appendix D were found to be 31.15¢ per 100 pounds on wheat and 28.08¢ per 100 pounds on coarse grain. The average of all the rates prescribed from points within these states for both wheat and coarse grain was 26.07¢, the reductions being an average of 5.09¢ per 100 pounds on wheat and 2.02¢ per 100 pounds on coarse grain. These reductions, expressed in percentages, were equivalent to a 16.31% reduction in the rates on wheat and a 7.17% reduction on coarse grain.

For the states of Montana, Idaho, Utah, Washington, Oregon and California, the principal grain growing states in the Mountain-Pacific Group, it was found that the average of all present wheat rates between the points named [fol. 733] in said Appendix D was 41.09¢ per 100 pounds and of all present coarse grain rates was 40.86¢ per 100 pounds. The corresponding prescribed rates in said Appendix D average 34.68¢ per 100 pounds, resulting in average reductions of 6.41¢ per 100 pounds on wheat and 6.18¢ per 100 pounds on coarse grain. Expressed in percentages, the average reductions were equivalent to 15.58% on wheat and 15.10% on coarse grain below the present rates.

The average of all present rates for the entire 17 states named above and covering the point to point rates prescribed in said Appendix D on wheat was found to be 35.18¢

per 100 pounds and on coarse grain, 33.22¢ per 100 pounds, while the prescribed rates for the same points average 29.75¢ per 100 pounds, resulting in an average reduction in wheat rates below the present rates of 5.43¢ per 100 pounds and in coarse grain rates below the present coarse grain rates of 3.47¢ per 100 pounds. The foregoing average reductions represent an average decrease, expressed in percentages, for the Western District as a whole, in wheat rates below the present average wheat rates of 15.43% and in coarse grain rates below the present average coarse grain rates of 10.44%.

In order to arrive, as nearly as may be, at a weighted average of the movement of grain and grain products in the Western District, the total amount of wheat and coarse grain, respectively, reported as having moved out of the counties where grown, was calculated from reports of the United States Department of Agriculture. From this calculation it was developed that, of the total wheat moved out of the counties where grown, in the 17 states, referred to above, 61.08% was moved out of the counties in the eight states in the Western Trunk Line Territory, 16.07% in the three states in the Southwestern Territory, and 22.85% in [fol. 734] the six states in the Mountain-Pacific Group. As to coarse grain, it was developed that 86.98% was moved out of the counties in the first group of eight states, 7.49% out of the counties in the second group of three states, and 5.53% out of the counties in the third group of six states.

As shown by Exhibit No. 81, introduced by deponent at the hearings before the Commission in the above-mentioned proceedings at page 5 thereof, the total revenue of more than 95% as represented by the mileage of the Western District Class L Carriers (being the carriers having gross revenues of $1,000,000 a year, or over, and controlling over 98% of the mileage of all carriers by railroad in the Western District) for the year 1924 from grain and grain products was $194,665,366, of which amount $113,297,500 was the revenue derived from wheat, and flour and meal (which together are assumed to be the traffic moved at the wheat rates). The remainder, ascribed to coarse grain and products thereof, was $81,367,866.

Applying to these amounts the respective percentages developed from the reports of the United States Department of Agriculture produced the estimated revenue de-

rived from the transportation of wheat and its products and coarse grain and products in each of the three groups of states. Applying to the revenues from wheat and its products and from coarse grain and its products the average percentages of reductions so developed in the three groups of States, it was found that the loss resulting from the application of the prescribed rates on wheat and products for the Western District would $17,161,807, amounting to an average of 15.15% of the gross revenues above stated. Following the same procedure on the coarse grains, it was found that losses resulting from the application of the prescribed rates for the Western District would be $4,818,216, being 5.92% of the gross revenues above [fol. 735] stated.

Combining the loss on wheat and products for the Western District with the loss on coarse grain and products developed that the total loss, caused by the average reductions in rates, would be $21,980,023, or, expressed in percentage, a loss of 11.29% of the total revenue of $194,665,366.

Deponent further states that the latest available figure of revenue from grain and grain products are those for the year 1929 for Class I Carriers in the Western District, the revenue from those commodities for that year being $190,491,876; and that, on the basis of the 1929 revenue, the losses to the carriers in the Western District for that year, determined as aforesaid, would be $21,506,533 annually.

In making the calculations, hereinabove stated, consideration has been given to the increases in rates prescribed as well as to the decreases.

Deponent further states that he has made a study of any beneficial revenue effects which may accrue to the carriers in the Western District as a result of the limitation upon transit, the possible elimination of transit balances outbound from primary markets, and the possible greater safeguarding of revenues from wasteful competition that may follow the reduced level of rates; and that, in his opinion, based upon such study, the revenue effects of these factors cannot in any way be measured, but will in any event not be such as to result in any substantial changes in the percentages of loss above stated.

The latest period for which complete statistics relating to the gross operating revenue and net railway operating

income of the carriers of the Western District for the year 1931 is for the months of January and February. During [fols. 736 & 737] said period the gross operating revenues of Class I Carriers in the Western District were $254,181,366, a decrease of 19.5% as compared with the same period in 1930 during which the gross operating revenues of the said carriers were $315,800,528. The net railway operating income of said carriers for the months of January and February, 1931, was $19,791,945, which was at an annual rate of return of 1.73% on their property investment, as compared with a net railway operating income of $33,260,161 during the months of January and February, 1930, which was at an annual rate of return of 2.99% on their property investment. Class I Carriers operate approximately 93% of all mileage in the Western District and their gross revenue- constitute approximately 98% of the gross revenues of all carriers operating in said district.

For the first 15 weeks in the year 1931, ended April 11, 1931 (the latest period for which complete statistics are available), the number of revenue freight cars loaded in the Western District totaled 3,754,369 as compared with 4,556,853 for the corresponding period of 1930, a reduction of 17.6%.

L. E. WETTLING.

Subscribed and sworn to before me this 6th day of May, 1931. Harley H. Johnson, Notary Public. (Seal.)

[fol. 738] IN UNITED STATES DISTRICT COURT

In Equity. No. 10479

[Title omitted]

AFFIDAVIT OF GENTRY WALDO—Filed May 6, 1931

STATE OF ILLINOIS,
County of Cook, ss:

Gentry Waldo, being first duly sworn deposes and says: That he is Assistant Freight Traffic Manager of the Union Pacific System Lines of Railroad and has held such position for the past five years, and that prior thereto he

has held various positions in the Freight Traffic Department of the Union Pacific Railroad and the Southern Pacific Lines in Texas, with a total railroad service of 34 years.

That the Union Pacific System lines of railroad operate in the States of Nebraska, Kansas, Colorado, Wyoming, Utah, Idaho, Montana, Oregon, Washington, Nevada and California, all of which are in the Western District as defined by the Interstate Commerce Commission in the proceedings entitled "Docket 17000, Rate Structure Investigation, Part VII, Grain and Grain Products Within the Western District and For Export", 164 I. C. C. 619.

Deponent further states that he has made a study of the report and order of the Interstate Commerce Commission in said proceedings and of the supplemental report and order entered therein April 10th, 1931, and of the effect thereof upon the revenues of the said Union Pacific System lines of railroad if the rates, rules and regulations therein [fol. 739] prescribed become effective.

Deponent further states that as a result of such study he estimates that there will be a reduction in the revenue of the Union Pacific System lines of railroad of at least $2,009,091 per year.

Deponent further states that such estimated loss has been determined on the assumption that the divisions of the new joint rates will be in the same proportions as the divisions of the present rates and in the following manner:

Because of the different trends of the movement of grain and grain products originated in different localities along the Union Pacific System, it was necessary to employ different methods as to the tonnage originated in certain of those localities. The Union Pacific System comprises four units; the Union Pacific Railroad Company, located in the States of Nebraska, Kansas, Colorado, Wyoming and Utah; the Oregon Short Line Railroad Company, located in the States of Utah, Idaho, Oregon and Montana; the Oregon-Washington Railroad & Navigation Company, located in the States of Oregon and Washington, and the Los Angeles & Salt Lake Railroad Company, located in the States of Utah, Nevada and California.

Union Pacific Railroad Company

All but a negligible percentage of the grain originated on the Union Pacific Railroad, whether moved beyond the

terminii of that Company in its original form or after being milled into some form of grain product, ultimately moves to terminii or points of interchange between the Union Pacific Railroad and its connecting line railroads on the Missouri River, notably Omaha, Nebraska, and Kansas City, Missouri. The basis of the Union Pacific revenue derived [fol. 740] from this tonnage is its local rate to such Missouri River junctions, whether the tonnage terminates at those junctions or continues or resumes its movement to destinations east of the Missouri River. In order to verify this the Accounting Department made an analysis of the movement of such tonnage originated during the year 1929 which showed that the revenue derived from 96 percent of it was based on local rates from the various points of origin to such Missouri River junctions. All but an inconsiderable part of that originated in Nebraska moved to or through Omaha, and of that originated in Kansas to or through Kansas City. From Colorado, Wyoming and Utah the movement was divided as between Omaha and Kansas City, but the rates from points of origin in those States to both Omaha and Kansas City are the same and will be the same if the prescribed rates are made effective. By applying to the actual tonnage originated in Kansas, Nebraska, Colorado, Wyoming and Utah, during the year 1929 the rates currently effective and those that will be published if the order in I. C. C. Docket 17000, Part 7, is complied with, it was found that the application of the latter to such traffic would result in a loss of approximately $802,198 per year.

Oregon-Washington Railroad & Navigation Company

The character of the movement of the tonnage originated at stations on the O. W. R. & N. is somewhat similar to that originated on the Union Pacific Railroad in that practically all of its moves to either Portland, Oregon, or Seattle, Washington. Based on the actual tonnage originated at each station and the percentage of it that found destination at Portland and Seattle, respectively, and applying thereto the present rates and those that will be published if the order in I. C. C. Docket 17000, Part 7, is complied with, it was estimated that there would result a loss of [fol. 741] approximately $643,421 per year.

Oregon Short Line Railroad Company, Los Angeles & Salt Lake Railroad Company

The rate adjustment which applies to most of the tonnage of grain and grain products originated at stations on the Oregon Short Line Railroad and Los Angeles & Salt Lake Railroad is somewhat different from that which applies to similar tonnage originated on the Union Pacific and O. W. R. & N. It is subject to what are commonly known as "joint through rates": that is, rates which apply to the entire movement from point of origin to final destination, whether the movement be continuous or interrupted at some intermediate station for milling or some other authorized purpose. Because of this different rate adjustment the applicable rate must be divided between the originating line and one or more railroads participating in the through movement, and an estimate of the loss in revenue that would be sustained as to this traffic involves much more intricate calculations. All carload shipments of grain and grain products originated at stations on the Oregon Short Line and L. A. & S. L. for the months of March, September and December, 1929, and the revenue accruing from such shipments to the Union Pacific System lines was determined by the Accounting Department from the waybills. This revenue was multiplied by four as being representative of the total revenue of the System Lines from that source for the year 1929, and the actual tonnage for the said three months was multiplied by four as being representative of the total tonnage for said year. Based upon the tonnage fro the year 1929, as so estimated, and applying the proportions of the through rates that would accrue to the Union Pacific System lines if the order in I. C. C. Docket 17000, Part 7, is complied with, there will be a loss of approximately $563,472 to the Union Pacific System lines in addition — the amounts hereinbefore set [fols. 742 & 743] forth, making a total of $2,009,091 per year.

The aforesaid total estimate loss does not include losses which will result from the lower rates prescribed in I. C. C. Docket 17000, Part 7, on traffic handled by the Union Pacific System delivered to it by connecting lines.

Deponent further states that the revenues derived by the Union Pacific System from the transportation of grain and

grain products for the year 1929 amounted to $17,420,749; and that the losses resulting from the application of the prescribed rates would be 11.53 per cent of such revenue.

Deponent further states that he is thoroughly familiar with the grain and grain products traffic in the states served by the Union Pacific System lines; that these states are served by other railroads, and that in his opinion, those railroads will suffer proportionately according to the volume of the movement of grain and grain products in which they participate.

Deponent further states that he has taken into consideration the full effect upon revenues which will result from any limitations upon transit, in elimination of transit balances outbound from primary markets, and in greater safeguarding of revenues from wasteful competition that should follow reduced level of rates, and that, in his opinion, the revenue effects of those factors cannot be measured but cannot in any event be so substantial as to cause a material change in the estimated losses above set forth.

(Signed) Gentry Waldo.

Subscribed and sworn to before me this 6th day of May, A. D. 1931. W. J. Gedl, Notary Public. (Seal.)

[fol. 744] IN UNITED STATES DISTRICT COURT

In Equity. No. 10479

[Title omitted]

AFFIDAVIT OF E. V. PETERSON—Filed May 6, 1931

STATE OF MINNESOTA,
County of Ramsey, ss:

E. V. Peterson, being first duly sworn, deposes and says: That he is at present, and has been since 1927, Statistician of Northern Pacific Railway Company, hereinafter referred to as Northern Pacific, and prior thereto and since 1902 has been engaged in statistical and accounting work for the Northern Pacific and that his total service in the accounting department of that railroad covers a period of

twenty-nine years. That as such Statistician he has been and is required to prepare statistics and data for use in proceedings before the Interstate Commerce Commission and various state commissions.

That he attended a number of the hearings before the Interstate Commerce Commission in the proceeding entitled "No. 17000, Rate Structure Investigation, Part 7, Grain and Grain Products within Western District and for Export," 164 I. C. C. 619, and prepared and submitted exhibits and oral evidence in said proceeding.

Affiant further states that he has examined the report [fol. 745] and order entered July 1, 1930, and the supplemental report and order entered April 10, 1931, in said proceeding, and that he has had numerous conferences with members of the Northern Pacific freight traffic department with the end in view of ascertaining the rates required by said reports and orders and the effect thereof upon the revenues of the Northern Pacific if said rates, rules and regulations therein prescribed should become effective. That as a result of such study he finds that the reduction in revenues of the Northern Pacific, if the prescribed rates become effect-, will be not less than five hundred thirty-one thousand dollars ($531,000) per annum. That such study has been conducted and said findings or conclusions as to losses have been determined in the following manner:

A study was made by affiant covering a test period of four weeks during 1928, those weeks being the last week in August, the second week in September, the third week in October, and the fourth week in November. In connection with the making of this study the Auditor of Freight Receipts of the Northern Pacific was requested by affiant to prepare a record of the movement of grain and grain products on the Northern Pacific and on this record was inserted the total revenue accruing to the Northern Pacific; the revenue which would accrue on the basis of the rates as prescribed in said proceeding and the increase or decrease which would result from the application of the rates prescribed. For the purpose of ascertaining the revenue on the basis of the rates as prescribed, such rates were inserted on the record by the freight traffic department of the Northern Pacific, and the result was tabulated and the

percentage of increase or decrease as applying on grain and grain products arrived at. This percentage of increase or decrease was then applied to the revenue on [fols. 746 & 747] grain and grain products for the average crop year for the five-year period ending July 31, 1929, which produced a decrease in revenue in the sum of five hundred thirty-one thousand dollars ($531,000) per annum, as hereinabove described.

Affiant further states that the method used by him in determining the estimated annual loss of revenue is a proper method and basis for approximating losses in revenue to the Northern Pacific which would accrue from the application of the rates on grain and grain products prescribed in said decisions and orders of the Interstate Commerce Commission.

E. V. Peterson.

Subscribed and sworn to before me this 4th day of May, 1931. My commission expires Oct. 21, 1935. G. T. C. Peterson, G. T. C. Peterson, Notary Public, Ramsey County, Minn. (Notarial Seal.)

[fol. 748] In United States District Court

In Equity. No. 10479

[Title omitted]

Affidavit of Paul Peters—Filed May 6, 1931

State of Illinois,
County of Cook, ss:

Paul Peters, being first duly sworn, deposes and says:

That he is and during the past 19 years has been Auditor Freight Traffic of The Chicago, Rock Island and Pacific Railway Company, hereinafter referred to as the Rock Island, that prior thereto he was Assistant Auditor Freight Traffic of said Company for 5 years, and that his total service in the Rock Island Accounting Department covers a period of 42 years.

Deponent further states that he has under his charge and direction a force of approximately 400 employes; that as Auditor Freight Traffic it is and has been his duty, among [fol. 749] others, to direct and supervise the examination and verification of the records of freight revenue receipts

for the purpose of determining that, as to all shipments of freight handled by the Rock Island or upon which it has performed a transportation service, the proper charges are assessed in accord-nce with the tariff rates and divided among the participating carriers in accordance with the agreed or established divisions of joint rates when joint rates are involved.

Deponent further states that The Chicago, Rock Island Gulf Railway Company, hereinafter referred to as the Gulf Railway, operates lines of railway in the State of Texas; that the Rock Island together with the Gulf Railway, hereinafter referred to jointly as the Rock Island Lines, operates 8,110 miles of railway in the following states: Illinois, Minnesota, Iowa, Missouri, Tennessee, Arkansas, Louisiana, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Colorado and New Mexico; that shipments handled by the Gulf Railway but not reaching the rails of the Rock Island do not appear in his accounts; and that accounting records of such shipments of grain and grain products in the period hereinafter mentioned were furnished to him by the Gulf Railway.

Deponent further states that he has made a study of the effect upon the revenues of the Rock Island Lines if the rates, rules, and regulations should become effective which are prescribed by the Interstate Commerce Commission in the proceeding entitled "No. 17000, Rate Structure Investigation, Part VII, Grain And Grain Products Within [fol. 750] The Western District And for Export"; that to acquaint himself with the said prescribed rates he has examined the Report and Order Entered July 1, 1930 and the Supplemental Report and Order entered April 10, 1931 in the said proceeding; and that he has had numerous conferences with members of the Rock Island Freight Traffic Department for the further purpose of ascertaining the rates required by the said Reports and Orders.

Deponent further states that, based upon such study, the reduction in the revenue of the Rock Island Lines if the prescribed rates become effective will be not less than $1,612,774.52 per annum. Further deponent states that the study has been conducted and the amount of said reduction has been determined in the following manner;

The carload shipments of grain and grain products, the records of which were examined and considered, were (a)

the shipments included in the revenue accounts of the Rock Island Lines for the year 1929 in the transportation of which the Rock Island Lines earned revenue in said year; and (b) the shipments forwarded in the year 1929 from transit points located on the Rock Island. For the purpose of the study these shipments were classified as follows:

(1) Shipments from foreign lines delivered to consignee at stations on the Rock Island (Gulf Railway here considered as a foreign line).

(2) Shipments as to the transportation of which the Rock Island was an intermediate carrier only (Gulf Railway here considered as a foreign line).

(3) Shipments moving out of transit points on the Rock Island and delivered to consignees at stations on the Rock Island.

(4) Shipments originating at stations on the Rock Island and delivered to consignees at stations on foreign lines (Gulf Railway here considered as a foreign line).

[fol. 751] (5) Shipments transported by the Gulf Railway in the movement of which the Rock Island did not participate.

(6) Shipments from any origin which remained at transit points on the Rock Island at the close of the year 1929.

As to the shipments included in the foregoing classifications (1), (2), (3), (4), and (5), the prescribed rate, except in the instances hereinafter noted, was applied to the movement of each shipment from point of origin to the rate-break point or to final destination and the revenue to accrue to the Rock Island Lines under the prescribed rate was compared with the revenue earned by the Rock Island Lines under the present rates. As to the shipments included in classification (6), the Rock Island stations were divided into 29 zones. On shipments which the Rock Island handled from stations in one zone and which it delivered to consignees in another zone, the revenue, earned under the present rates and to accrue under the prescribed rates, was determined by applying to each of such shipments the present rate and the prescribed rate from the center point in the origin zone to the center point in the destination zone.

Whenever any of the shipments moved under joint rates it was assumed as to each such shipment that the revenue to accrue to the participating carriers under the prescribed rate would be divided in the same proportions as the revenue earned under the present rate is divided. Following the method outlined above the results obtained are as follows:

	Revenue earned under the present rates	Revenue to accrue under the prescribed rates
Shipments from foreign lines delivered to consignee at stations on the Rock Island	$1,328,001.31	$1,149,961.93
[fol. 752] Shipments as to the transportation of which the Rock Island was an intermediate carrier only	1,267,143.75	1,098,587.19
Shipments moving out of transit points on the Rock Island and delivered to consignees at stations on the Rock Island	3,983,927.00	3,569,386.86
Shipments originating at points on the Rock Island and delivered to consignees at points on foreign lines	7,150,019.48	6,519,933.02
Shipments transported by The Chicago, Rock Island and Gulf Railway Company in the movement of which the Rock Island did not participate	89,998.93	75,947.58
Shipments from country points on the Rock Island or on foreign lines which were left at transit points on the Rock Island at the close of the year 1929	4,310,391.05	4,102,890.32
Total	$18,129,481.42	$16,516,706.90
Loss per annum		$1,612,774.52

[fol. 753] Deponent further states that in pursuing the said study the prescribed rates which were applied were the rates required by the said report of July 1, 1930, as modified and corrected by the said supplemental report except that (a) on shipments moving from Minneapolis to Chicago and Peoria under the present 13-cent and 11½-cent proportional rates, the 11-cent proportional rate prescribed in the said report of July 1, 1930, was applied in lieu of the 12-cent proportional rate prescribed in the said supplemental report; (b) on shipments moving from Cairo and Memphis to Arkansas and Louisiana the rates prescribed in the said report of July 1, 1930, were applied in lieu of the lower rates prescribed in the said supplemental report; and (c) the minimum flat rates inbound to markets and the minimum rates under the interior scales, as prescribed in the said supplemental report, were not applied.

Deponent further states that an increase of one cent in the rate applied on the said shipments from Minneapolis to Chicago and Peoria would reduce the revenue loss heretofore stated by the sum of $37,761.60; that shipments to which the said prescribed minimum rates would ultimately apply are few in number; and that the application of said minimum rates would change the result of the study if at all but slightly.

Deponent further states that shipments of flaxseed, linseed meal and cake, seeds and cottonseed meal and cake take the grain rates or rates related thereto which will be reduced if the prescribed rates become effective; that the records of such shipments were not examined or considered; and that the losses in the transportation thereof to-
[fols. 754 & 755] gether with other losses not reflected by the study such as, among others, the further losses that would be shown in the instances aforementioned if the lower rates in the said supplemental report had been applied in lieu of the higher rates in the said report of July 1, 1930, at least offset the gain from the said increases prescribed in the supplemental report.

Deponent further states that the rates prescribed in the said report of July 1, 1930 and the said supplemental report which will apply to the movement of the grain and grain products traffic over the Rock Island will also apply to the grain and grain products traffic moving over other railroads operating in the same territory, and that in his

opinion such other railroads will sustain similar losses in revenue the extent of which being dependent upon the volume of the movement of grain and grain products in which they participate.

(Signed) Paul Peters.

Subscribed and sworn to before me this 4th day of May, A. D. 1931. (Signed) W. J. Gedl, Notary Public. (Seal.)

[fol. 756] IN UNITED STATES DISTRICT COURT

In Equity. No. 10479

[Title omitted]

AFFIDAVIT OF B. F. E. MARSH—Filed May 6, 1931

STATE OF ILLINOIS,
County of Cook, ss:

B. F. E. Marsh, being first duly sworn, deposes and says: That he is Assistant General Freight Agent of The Atchison, Topeka and Santa Fe Railway Company operating lines of railroad in the States of Illinois, Iowa, Missouri, Kansas, Oklahoma, Colorado, New Mexico, Arizona and California, and which lines of railroad, together with the lines of the Gulf, Colorado and Santa Fe Railway Company and the Panhandle and Santa Fe Railway Company in the States of Texas, Oklahoma and Louisiana, comprise what is known as the Atchison, Topeka and Santa Fe Railway System.

That said The Atchison, Topeka and Santa Fe Railway Company, Gulf, Colorado and Santa Fe Railway Company, and Panhandle and Santa Fe Railway Company (hereinafter referred to as the Santa Fe Companies), petitioners in this proceeding, were respondents in the proceeding before the [fol. 757] Interstate Commerce Commission entitled No. 17000, Rate Structure Investigations, Part 7, Grain and Grain Products Within Western District and For Export, 164 I. C. C. 619, and are subject to the order and supplemental orders issued by the Commission in said proceeding.

Deponent further states that he has held his present posi-

tion with the Atchison, Topeka and Santa Fe Railway Company for approximately fifteen years and that for many years prior thereto he was employed in the traffic department of said Company, and that during all of said years of service with said Company his particular assignment has been the adjustment of and making of rates on grain and grain products in the territory served by said railway.

Deponent further states that he attended practically all of the hearings before the Interstate Commerce Commission in Docket 17000—Part 7, and prepared and submitted evidence and exhibits in said porceeding, and that he is familiar with the present grain rate structure in the territory served by the Santa Fe and with the rate structure prescribed by the Commission in Docket 17000—Part 7, for application in said territory; that since the first order of the Commission in said proceeding he has been engaged continuously in the compilation and preparation of rates to be published in said territory in compliance with said order.

Deponent further states that he has made a study of the report and order of the Interstate Commerce Commission and of the supplemental report and order in said Docket 17000—Part 7, in order to determine the effect thereof upon the revenues of the Santa Fe Companies if said rates, rules and regulations therein prescribed should become effective, and that as a result of such study deponent believes the effect of said order will be to reduce the revenues of the said companies to be earned in the transportation of [fol. 758] grain and grain products by approximately $2,523,890 per annum.

Deponent further states that his belief as to the annual estimated reduction in revenues on the traffic in grain and grain products handled by the lines of said system as above stated is based upon the following facts: That the Santa Fe Companies currently keep, in the regular course of their business, statistics showing the movement by states to each of the other states on said system lines, separated as to tonnage and revenue of the different commodities, which statistics include both traffic originating on said Santa Fe System lines and to traffic received from and delivered to connecting lines. Deponent then applied to the revenue on traffic in grain and grain products for the year 1929 be-

tween each of the states a percentage of reduction arrived at by determining the average difference between the present rates and the prescribed key point rates between points in such states as indicated in Appendix D to the report of the Commission in Docket 17000—Part 7, 164 I. C. C. 619; and deponent further states that in his opinion, based upon his duties in preparing for publication the new rates prescribed by the report and order in Docket 17000—Part 7, that said percentage of reduction indicated by all of the key point rates prescribed between any two states will closely approximate the reduction in all rates between all points in any two states covered by said report and order.

Deponent further states that based upon such calculations arrived at in the manner described, the loss of revenue to the Santa Fe Companies for the calendar year 1929, if the rates prescribed in Docket 17000—Part 7 had been applied to the traffic in grain and grain products in lieu of the present rates which were applied thereto, would have amounted to $3,314,260, a reduction of 13.33 per cent. And [fols. 759 & 760] that if the same percentage of reduction were applied to the traffic in grain and grain products of the Santa Fe System lines for the years 1925 to 1929, inclusive, the average annual reduction in revenue upon said traffic would have been $2,523,890, a reduction of 13.24 per cent, as set forth in statement hereto annexed marked Exhibit A, and that in deponent's opinion, based upon his long experience and familiarity with the traffic of said Santa Fe System lines in grain and grain products, if the said rates prescribed in Docket 17000—Part 7, become effective the future annual loss to said lines will be not less than said amount of $2,523,890.

Deponent further states that he has made a study of the beneficial effects which might accrue to said Santa Fe System lines as a result of the partial elimination of transit balances outbound from primary markets, and possible conservation of revenue and possible safeguarding of revenues from wasteful competition that may follow the reduced level of rates, and that in his opinion, based upon such study, the revenue effects of those factors cannot in any way be measured, but will in any event be so small in amount as to cause no material change in the estimated losses hereinabove set forth.

(Signed) B. F. E. Marsh.

Subscribed and sworn to before me this 6th day of May, A. D. 1931. W. J. Gedl, Notary Public. (Seal.)

[fol. 761] IN UNITED STATES DISTRICT COURT

In Equity. No. 10479

[Title omitted]

AFFIDAVIT OF PATRICK J. MCCARTHY—Filed May 6, 1931

STATE OF ILLINOIS,
County of Cook, ss:

Patrick J. McCarthy, being first duly sworn, deposes and says:

That he is and during the past two years has been General Freight Agent of the Missouri Pacific Railroad Company, hereinafter referred to as the Missouri Pacific; that prior thereto he was Assistant General Freight Agent of said company for 14 years, and that his total service in the Missouri Pacific Traffic Department covers a period of 30 years.

Deponent further states that the Missouri Pacific operates 7,450 miles of railway in the following states: Oklahoma, Colorado, Kansas, Illinois, Missouri, Nebraska, Arkansas and Tennessee; that for the past 12 years, he has had under his direct charge and supervision all matters pertaining to the grain and grain products traffic of the [fol. 762] Missouri Pacific and to the rates which apply in the transportation of such commodities; and that he is familiar with the present grain and grain products rate adjustment in the Western District.

Deponent further states that he attended all the hearings before the Interstate Commerce Commission in the proceeding entitled "No. 17000, Rate Structure Investigation, Part VII, Grain and Grain Products Within The Western District And For Export" except the hearings held at Portland, Oregon, and Los Angeles, California; that he has examined the report and order entered July 1, 1930 and the supplemental report and order entered April 10, 1931 in said proceeding; and that he has made a study of the effect upon the revenues of the Missouri Pacific if the rates, rules, and regulations should become effective which are prescribed in the said reports and orders.

Deponent further states that based upon such study the reduction in the revenue of the Missouri Pacific if the prescribed rates become effective will be not less than $2,142,380.00 per annum. Further deponent states that the study has been conducted and the amount of said reduction has been determined in the following manner:

The period covered is the crop year beginning July 1, 1929, and ending June 30, 1930. The number of tons of wheat and flour and of the other grains and grain products were found which the Missouri Pacific transported during said period (a) into or through the Missouri River markets of Kansas City, Leavenworth and Atchison, (b) into the market of St. Louis, (c) through the market of St. Louis for points east thereof, and (d) to points on and beyond the [fol. 763] rails of the Missouri Pacific in the States of Arkansas, Oklahoma, Louisiana, Texas and Tennessee.

The average reduction in revenue per ton derived from each of the grains and products transported into the said Missouri River markets was determined and similar findings were made as to the traffic transported which was included in the other classifications mentioned above. It was found that if the prescribed rates become effective the reduction in revenue on the said traffic into Kansas City, Leavenworth and Atchison would be $551,587; that the reduction in revenue on the traffic into St. Louis would be $235,623; and that the reduction in revenue on the traffic through the market of St. Louis and points east thereof would be $361,890; that the reduction on traffic to points on and beyond the rails of the Missouri Pacific in the States of Arkansas, Oklahoma, Louisiana, Texas and Tennessee would be $993,280; and that the total reduction would be $2,142,380.

Deponent further states that the revenue derived by the Missouri Pacific from the transportation of grain and grain products during the same crop year, that is, the crop year beginning July 1, 1929, and ending June 30, 1930 amounted to $9,860,702; and that the losses resulting from the application of the prescribed rates would be 21.72% of such revenue.

Deponent further states that it appears on the face of the said report of July 1, 1930 and the said supplemental report that the rates applicable to the movement of grain and grain products in the Southwest Territory have been ma-

terially reduced; and that a substantial portion of the [fols. 764 & 765] losses in revenue to be incurred by the Missouri Pacific in the event the prescribed rates become effective will be suffered on grain and grain products traffic in said territory.

Deponent further states that the rates prescribed in the said report of July 1, 1930 and the said supplemental report which will apply to the movement of grain and grain products over the Missouri Pacific will also apply to the grain and grain products traffic moving over other railroads operating in the same territory, and that in his opinion such other railroads will sustain similar losses in revenue the extent of which being dependent upon the volume of the movement of grain and grain products in which they participate.

Deponent further states that he has made a study of the beneficial effects which might accrue to the Missouri Pacific as a result of the partial elimination of transit balances outbound from primary markets, and possible safeguarding of revenues from wasteful competition that may follow the reduced level of rates, and that in his opinion, based upon such study, the revenue effects of those factors cannot in any way be measured, but will in any event be so small in amount as to cause no material change in the extent of the losses hereinbefore set forth.

(Signed) Patrick J. McCarthy.

Subscribed and sworn to before me this 5th day of May, 1931. My Commission expires July 1, 1934. J. A. Turchany, Notary Public. (Seal.)

[fol. 766] IN UNITED STATES DISTRICT COURT

In Equity. No. 10479

[Title omitted]

AFFIDAVIT OF A. B. ENOCH—Filed May 7, 1931

STATE OF ILLINOIS,
County of Cook, ss:

A. B. Enoch, being first duly sworn, deposes and says:

That he is one of the attorneys who appeared for the carriers of the Western District in the proceeding before

the Interstate Commerce Commission, hereinafter called the Commission, entitled "No. 17000, Rate Structure Investigation, Part VII, Grain and Grain Products Within the Western District and For Export"; that he attended all of the hearings held therein; that he participated in the preparation of the Brief and Argument and of the Petition for Rehearing in behalf of said respondents which were filed with the Commission, and that he is familiar with the record before the Commission in said proceeding.

Deponent further states that at pages 697 and 698 of its report of July 1, 1930, in said proceeding there is reference to many different checks and estimates made by the Commission to determine the revenue effects of the increases [fols. 767 & 768] and decreases which it is said will follow the effectiveness of the order therein and further, there is reference to increased revenues already granted in certain other cases and that at page 627 of said report there occur references to the rate of return of the carriers in 1928; that evidence of the said checks and estimates was not submitted and the said record does not show or contain any of the said checks and estimates; and the said record does not show or contain any evidence of increased revenues granted in certain other cases nor does it show that the revenues had been increased in certain other cases; and the said record does not show or contain any evidence of the net railway operating income or rate of return of the carriers in 1928.

(Signed) A. B. Enoch.

Subscribed and sworn to before me this 6th day of May, 1931. (Signed) W. J. Gedl, Notary Public. (Seal.)

[fol. 769] IN UNITED STATES DISTRICT COURT

In Equity. No. 10479

[Title omitted]

AFFIDAVIT OF R. S. OUTLAW—Filed May 7, 1931

R. S. Outlaw, being first duly sworn, deposes and says: That he is Commerce Attorney of The Atchison, Topeka and Santa Fe Railway Company, one of the petitioners in

the above-entitled cause; that in that capacity he attended the greater part of the hearings before the Interstate Commerce Commission in No. 17000, Rate Structure Investigation, Part VII—Grain and Grain Products Within Western District and For Export, to-wit: the hearings at Dallas, Texas, Wichita, Kansas, Chicago, Illinois, Minneapolis, Minnesota, and Seattle, Washington; that he is familiar with the record in said proceeding, having studied the testimony introduced by the Commission and other parties in the proceeding for the purposes of preparing briefs and memoranda, and in connection with the preparation of the above-entitled case; referring to pages 627 and 698 of the report of the Commission (Exhibit E to the petition in this Court, that (1) the record in said case before the Commission was closed on September 22, 1928, and that neither [fols. 770 & 771] the investment of the carriers, as shown by their books, as of December 31, 1928, nor the net railway operating income of the carriers for the year 1928, nor their rate of return, was incorporated in said record; (2) that no checks or estimates of the revenue effects of the increases or decreases which followed the effectiveness of the action of the Commission were incorporated in the record; (3) that no evidence of increased revenues granted in other cases was incorporated in said record; and that none of the foregoing data was made subject to cross-examination by the carriers.

R. S. Outlaw.

Subscribed and sworn to before me this 7th day of May, 1931. Carl Just, Notary Public. (Seal.)

[fols. 772 & 773] In United States District Court

Affidavit of C. B. Bee—Filed May 6, 1931

I, C. B. Bee on oath depose and say:

That I reside in Oklahoma City, Oklahoma; that I am the Traffic Advisor of the Oklahoma Corporation Commission; that for upwards of twenty years I have been continuously engaged as a rate expert in the service of the regulatory commissions of the States of Arkansas, Missouri, and Oklahoma; that during all of said time, as a

part of my duty, I have been engaged in watching the changes in rates made by common carriers, and the effect thereof; that at various times I have made studies of the effect of rate changes applicable to grain upon the prices paid to producers for such grain by checking the prices prevailing before and after such changes; and that I have thereby become familiar with the practices prevailing in the grain business as respects prices paid to producers by grain dealers.

I further depose and say that the principal factors in the determination of the price paid for any grain to the producer at any point are the price for such grain at the time prevailing in the market, and the freight rate from the point of sale to such market, the full amount of the freight rate to the market being taken from the market price in the fixing of the farmer's price.

(Signed) C. B. Bee.

STATE OF ILLINOIS,
County of Cook, ss:

Subscribed and sworn to before the undersigned Notary Public, this 6th day of May, 1931.

George R. Mann, Notary Public. My Commission expires Mar. 22, 1932. (Seal.)

[fols. 774 & 775] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. W. MANNING—Filed May 7, 1931

STATE OF TEXAS,
County of Tarrant, ss:

Before me this day personally appeared W. W. Manning, to me personally known, who, after being by me duly sworn, upon his oath deposes and says:

That he is Chairman of a General Committee appointed by all grain, grain products and mixed feed dealers and manufacturers in the State of Texas, that he has been Chairman of that committee for the last four years, and that he is familiar with methods used by the Texas elevators, grain dealers, flour millers and mixed feed manufacturers in doing business, and the competition with which

they are faced in conducting their business. That he is also familiar with the decision of the Interstate Commerce Commission in Docket 17000, Part VII, 164 I. C. C. 619, and the commercial effect that the rates therein prescribed would have on Texas elevators, grain dealers, flour millers and mixed food manufacturers, if they become effective April 1st, 1931.

That, based on thirty years' experience in the grain business in the southwest and his general knowledge herein stated, he knows that the rates prescribed in the foregoing decision and order, if they become effective, will result in substantial loss of business by Texas elevators, grain dealers, flour millers and mixed feed manufacturers; that much of the business so lost will be permanently lost and cannot be regained; that such loss of business will seriously injure and damage Texas elevators, grain dealers, flour millers and mixed feed manufacturers.

(Signed) W. W. Manning.

Subscribed and sworn to before me this 8th day of April, A. D. 1931. My commission expires July 1, 1931. (Signed) Pauline P. Collins, Notary Public in and — Tarrant County, Texas.

[fol. 776] In United States District Court, Northern District of Illinois, Eastern Division

No. 10479

The Atchison, Topeka and Santa Fe Railway Company et al.

v.

United States of America and Interstate Commerce Commission

Order for Temporary Restraining Order—May 7, 1931

On this 7th day of May, A. D. 1931, this cause coming on to be heard on petitioners' application for a temporary injunction and for a temporary stay. And it appearing that notice of said application has been duly given to the defend-

ants in conformity with the statute and counsel for petitioners and defendants having been heard and the court being fully advised in the premises, the court doth find from the sworn bill and from the affidavits of L. E. Wettling; E. V. Peterson; Gentry Waldo; B. F. E. Marsh; Patrick J. McCarthy and Paul Peters, now on file in this cause, that irreparable damage would result to said petitioners in this, that unless the enforcement of the order of the Interstate Commerce Commission entered July 1, 1930, as amended by supplemental order entered April 10, 1931, in a proceeding entitled Rate Structure Investigation, Part VII—Grain and Grain Products within Western District and for Export, copies whereof are attached to the petition, is stayed or suspended the petitioners herein will suffer an irreparable loss in revenue as a result of the said orders of the Commission of approximately twenty million dollars per annum.

It is therefore ordered, adjudged and decreed as follows, [fols. 777 & 778] namely that the operation of the said order of July 1, 1930 and supplemental order of April 10, 1931 of the Interstate Commerce Commission be stayed and suspended for sixty days from this date.

William M. Sparks, Charles E. Woodward, Walter C. Lindley.

Service of a copy of this Order is hereby acknowledged this 7th day of May, 1931.

Elmer B. Collins, for the United States. E. M. Reidy, H. L. Underwood, for the Interstate Commerce Commission.

[fols. 779 & 780] [File endorsement omitted]

[fol. 781] IN UNITED STATES DISTRICT COURT

In Equity. No. 10479

[Title omitted]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED OF BEHALF OF PETITIONERS—Filed June 6, 1931

Petitioners submit the following proposed findings of fact and conclusions of law to be made under Equity Rule 70½, on application for interlocutory injunction.

Findings of Fact

1. This is an application by petitioners for an interlocutory injunction and the facts hereinafter found appear from the sworn petition, exhibits thereto annexed, the answers thereto and the affidavits, submitted on said application.

2. Since March 1, 1920, the petitioners have been and now are common carriers of property and passengers by railroad subject to the Interstate Commerce Act.

3. A number of the petitioners have been and now are engaged in the operation of lines of railroad in the Northern District of Illinois, Eastern Division, and a number of [fol. 782] them have their principal offices in the City of Chicago. The matter covered by the Order of the Interstate Commerce Commission (called the Commission) hereinafter referred to, arose in part in said Northern District of Illinois, Eastern Division.

4. On the 12th day of March, 1925, the Commission on its own motion instituted an investigation of the rate structure of common carriers by railroads subject to the Interstate Commerce Act, entitled "Rate Structure Investigation", Docket No. 17,000. A copy of the Order instituting said investigation is attached to the petition marked "Exhibit A", and a copy of a statement issued "To the Public" on the same day is attached to the petition marked "Exhibit B".

5. The said investigation was instituted by the Commission under and pursuant to a joint resolution of Congress, adopted January 30, 1925, commonly and hereinafter referred to as the Hoch-Smith Resolution.

6. Said investigation was divided by the Commission into separate parts covering the rates on separate descriptions of traffic, and one of these parts, Part VII, hereinafter referred to as the "Grain Case" or the "present proceeding", was instituted to cover the rates on grain and grain products within the Western District and the State of Illinois, from the Western District and the State of Illinois for export, and ex-Lake rates on grain and grain products when for export.

7. Pursuant to Section 15a of the Interstate Commerce Act the Commission in Increased Rates, 1920, 58 I. C. C. 220, divided the continental United States into four rate-groups, two of which were defined as the Western Group and the Mountain Pacific Group, respectively which together comprise the Western District as defined in the Grain Case. (Petition p. 6.)

[fol. 783] 8. Hearings were held and evidence was taken at various times and places and the record in the Grain Case was closed on September 22, 1928. (Petition p. 4.)

9. On July 1, 1930 the Commission issued its Report, hereinafter referred to as the Report and Order in the Grain Case, which Order incorporates the Report as a part thereof by reference. A copy of the Report and Order (as entered on July 1, 1930) is attached to the Petition and marked "Exhibit E". On April 10, 1931 by Supplemental Report and Order, the Commission modified in certain respects its original Report and Order. A copy of the Supplemental Report and Order is attached to the Petition, marked "Exhibit F". The effective date of the Order as so modified is June 1, 1931.

10. It appears from the Report that the revenue from grain and its products constitutes approximately 12% of the revenues of the carriers in the Western District (Exhibit E, p. 628). The average of the new rates prescribed by Appendix D of the Report and Order of the Commission is approximately 13% less than that of the existing rates (Petition, p. 14, Exhibit E, Appendix D). The effect of the Order is to reduce the revenue of the carriers by approximately $20,000,000 per annum (Petition, p. 14, Affidavits of Wettling, et al.).

11. The order of the Commission, in addition to reducing the general level of said rates, requires the carriers to remove certain inequalities found by the Commission to exist in the relationship of certain rates on grain and grain products as compared with other rates thereon, and requires the carriers to revise and modify certain of their practices relating to the transportation of grain and grain products, including transit. It appears from the face of the report that in order to correct said inequalities and practices it was not necessary to reduce the general level

of the rates or the revenues of the carriers and that said reductions were not incidental thereto.

[fol. 784] 12. In Reduced Rates, 1922, 68 I. C. C. 676, the Interstate Commerce Commission, pursuant to Section 15a of the Interstate Commerce Act, fixed "the fair return" to be received under said section at 5.75%, and has not subsequently modified the rate so fixed (Petition p. 7).

13. In a proceeding entitled Kansas Public Utilities Commission v. A. T. & S. F. Ry. Co., 83 I. C. C. 105, decided October 11, 1923 (Exhibit G) and again in "Rates and Charges on Grain and Grain Products", 91 I. C. C. 105 (Exhibit H), decided on July 10, 1924, the Commission found that the existing rates were not unreasonable or unlawful under Section 1 of the Interstate Commerce Act, that they cast no undue burden on the grain traffic and could not be reduced consistently with the requirements of Section 15a of the Interstate Commerce Act.

14. The percentage of return, stated in the Report to have been received by the carriers in each of the eight years considered by the Commission therein, was materially less than 5.75 per cent. The maximum rate of return in any year, as so stated, was 4.45 per cent. and the average for the period 3.9 per cent. (Exhibit E, p. 627).

15. In finding that the proposed reductions would not threaten the maintenance of an adequate system of transportation, the Commission took into consideration matters not of record, to wit, certain checks and estimates in respect to the revenue effects of the order on the one hand, and increased revenues supposed to result or to have resulted from action in other cases on the other (Petition, pp. 27-28; Affidavits of A. B. Enoch and R. S. Outlaw).

16. It appears from the Report that the rates on grain and grain products in the Western District have been largely approved or prescribed by the Commission (Petition, p. 18; Exhibit E, p. 660).

[fol. 785] 17. The effect of the Order, in addition to reducing the general level of the said rates, is materially to reduce many rates specifically approved or prescribed by the Commission as reasonable and lawful under the Interstate Commerce Act, including many rates approved or

prescribed as reasonable maximum rates thereunder, contemporaneously with the conduct of the Grain Case, and including rates contemporaneously with the conduct of said proceeding approved or prescribed as reasonable maximum rates, subject only to the further determination by the Commission in the Grain Case as to whether they were the lowest possible lawful rates under the Hoch-Smith Resolution (Petition, pp. 18-26).

18. (a) In Kansas Public Utilities Commission v. A. T. & S. F. Ry. Co., 83 I. C. C. 105, decided October 11, 1923, the Commission found (Petition, p. 9; Exhibit G, pp. 114-115):

(1) That the rate of return upon the aggregate value of the property of the carrier in the Western Group for the year 1922 was less than 4%, and for the first four months of 1923 approximately 4.1%.

(2) That "carriers in the Western Group have been and are now earning considerably less than the prescribed return, and apparently less than the fair return to which they are entitled under their constitutional rights, entirely independent of Section 15a."

(3) That it was improbable that a reduction in the then existing rates would so increase the movement of grain and grain products as to enable the carriers to make up to any appreciable extent the loss in revenue should a general reduction in these rates be ordered.

[fol. 786] (4) That the record in said case afforded no basis "even for a suggestion as to a reallocation of the transportation burden."

(5) That many of the rates therein assailed (meaning thereby the rates then in effect) had been prescribed by the Commission; that others were depressed by competition of various kinds.

(b) Thereafter in Rates and Charges on Grain and Grain Products, supra (decided July 10, 1924), the Commission made the following specific findings of fact (Petition pp. 10-11; Exhibit H pp. 163-164):

"(a) That rates on grain, grain products, and hay, generally speaking, are now on a somewhat lower basis compared with pre-war freight rates than are the carload rates on other traffic.

"(b) That the earnings per car, per car-mile, and per ton-mile on grain and grain products, compared with other classes of traffic and with all carload traffic, do not show that grain and its products are now contributing more than their fair share to the revenues of the carriers in this group, considering the value of the traffic, the average hauls, the relative services performed, and the ratio of revenue produced by grain and grain products to total carload revenue compared with former years.

"(c) That there has been an increase in the average loading of grain and its products in recent years as well as in the average loading of all carload traffic, although not to the same extent in the case of all carload traffic. This factor was given weight in Rates on Grain, Grain Products, and Hay, supra, wherein we required reductions to be made in the rates for the transportation of these commodities.

"(d) That there has been slow but progressive improvement in the economic condition of agriculture in the western group since 1921, though the improvement in grain-raising areas is less than with respect to other classes of agriculture.

[fol. 787] "(e) That the present adjustment of rates on grain and its products from the 'element of value' standpoint, compared with the other heavy-loading commodities moving in volume, pointed to by complainants, as profiting by the disturbance in relative values, is not unfavorable to grain and grain products.

"(f) That despite a peak year in 1923 from the standpoint of traffic handled, it does not appear that respondents made a fair return, after giving due consideration to the complainants' contentions as to abnormal expenditures for maintenance of equipment, and to the aggregate valuation.

"(g) That we have no assurances on this record that there will be such further increases in tonnage or such reductions in operating expenses in the immediate future as to enable respondents to earn an excess over a fair return. Any further reduction in revenue would increase the shortage in the fair return of carriers in the western group.

"(h) That large additions to capital must continuously be made by carriers in this group for needed additions and betterments, which can not be done if the credit of the car-

riers is seriously affected by undue impairment of their net revenues from operation.

"(i) That the benefit which would accrue to the average farmer in case of a reduction in rates is small compared with the aggregate disastrous effect on certain of respondents' revenues and on their credit, and there is serious doubt whether farmers would not in many instances lose from impaired railroad service more than they could possibly gain from a reduction in rates, even if the farmers would get the entire benefit of any reduction made."

(c) The Report in the present proceeding neither reverses nor qualifies any of said findings and contains no findings or recitals of material changes in the pertinent facts or of any additional facts.

[fol. 788] 19. In prescribing the lowest possible lawful rates on grain and grain products (Exhibit E, p. 700) as maximum reasonable rates (Exhibit E, Order pp. I and II following p. 822) the order of the Commission will prevent the carriers pro tanto from earning as nearly as may be the rate of return required by Sec. 15a.

20. In Rates and Charges on Grain and Grain Products, supra, the Commission found that the benefit, if any, which would accrue to the producer from the reduction of rates on grain and grain products would be comparatively small, while the injury which would result to the carriers from the material reduction in their revenues therefrom would be substantial. It appears from the report that the condition of agriculture had improved since the date of the decision in the aforesaid case (Exhibit E, p. 627), but that there had been no material improvement in the financial condition of the railroads (Exhibit E, p. 627). The Commission in its Report did not find that the producer would be materially benefited by the reductions in rates immediately required, but found that the effect upon the producer of any change in rates was more or less speculative (Exhibit E, p. 643).

21. It appears from the Report that there were offered in evidence before the Commission certain cost studies and analyses, but the Report contains no finding that the existing rates exceed the cost of the service and a fair return upon the value of the property devoted thereto and no find-

ing as to what is the relation between the rates and the cost of service (Exhibit E, pp. 629-631).

22. The Report contains no finding that the existing rates cast an undue burden on the traffic in grain and grain products. The Report contains no finding as to the relation between the existing rates and the value of the service and no recitals or statements of fact bearing either upon the relation of said rates to the rates on other commodities or to the value of the service.

[fol. 789] 23. The record before the Commission consisted of approximately 53,000 pages of transcript, 2,100 exhibits and 20,000 pages of briefs, exceptions, oral argument and memoranda. The case was submitted to the Commission July 1, 1929, and decided July 1, 1930, and involved the determination of three-score and more major issues. The Report of the Commission dated July 1, 1930 consists of 156 printed pages, and Appendix D thereof prescribes over 2,000 specific rates. The said Report was in preparation as early as November 30, 1929, prior to the decision of the Supreme Court in Ann Arbor R. R. Co. v. United States, 281 U. S. 658, decided June 2, 1930 (Petition, p. 17).

24. The petitioners herein filed with the Commission two petitions for rehearing dated respectively September 6, 1930 and February 18, 1931, both of which were denied. Copies of said petitions for rehearing are attached to the petition herein, marked Exhibit I and Exhibit L respectively. In both of said petitions for rehearing the attention of the Commission was directed to the fact that by reason of the material changes in conditions which had occurred since the close of the record on September 22, 1928 the said record was unrepresentative of existing or future conditions. The same representations were made to the Commission informally by statements filed by the chief executive officers of the petitioners.

25. In the petition of February 18, 1931 (Exhibit L; Petition pp. 31-34) the petitioners alleged, and offered to prove, among other facts, the following:

(a) That the gross revenues of the carriers in the Western District had declined approximately 15% because of decreases in the volume of traffic handled;

(b) That the carriers in the said District had never since the enactment of the Transportation Act, 1920, re-
[fol. 790] ceived the fair rate of return contemplated thereby; that during each of the six years immediately preceding the filing of the said petition the net railway operating income of the carriers had been greatly below that contemplated and required by the said section; and that in the year 1930 the net railway operating income of said carriers was less by more than $100,000,000 than the average net operating railway income of the five years immediately preceding;

(c) That due to reductions in gross and net revenues, the net railway operating income of the carriers in 1930 was not less than $234,838,565 below the amount required to equal 5.75% on a minimum valuation of the property of the carriers and that the carriers' rate of return on true value of their property in 1930 had declined, since the close of the hearing, to not more than 3.1%;

(d) That the traffic handled in January, 1931, had declined 14.06% below that handled in January, 1930, by reason whereof the current net railway operating income and rate of return was even lower than that received in 1930 and would be still further reduced by not less than $20,000,000 if the order of the Commission should become effective;

(e) That the net railway operating income for the year 1930, inadequate as it was, had been accomplished only through a drastic retrenchment program, including sweeping reductions in maintenance, and resulting in increasing unemployment throughout the Western District, the number of employees therein having declined from 637,092 in November, 1929, to 508,664 in November, 1930;

(f) That, since the close of record, there had been an increased diversion of traffic to other agencies of transpor-
[fol. 791] tation, to wit, motor buses, motor trucks, water line carriers and pipe lines, all of which adversely affected the ability of the carriers to maintain an adequate net railway operating income;

(g) That traffic in grain and grain products is the only major description of traffic, the volume of which had not declined since the close of the record; that such traffic was

moving freely under existing rates and that neither the volume nor freedom of movement would be increased by the required reductions therein, as a result of which the effect of the Order was materially to reduce the revenues of the carriers from the only major classification of traffic, the volume of which had not declined;

(h) That since the close of the record the aforesaid and other changed conditions had been such as seriously to impair the credit and adversely to affect the marketability of the securities of the carriers in the Western District, to threaten the maintenance of an adequate system of transportation, and to impair the ability of the carriers to provide the same; and

(i) That the conclusion of the Commission, as expressed in its Report, that the reductions required would not threaten the maintenance of an adequate system of transportation, were based upon checks and estimates of the revenue effects of the Order and of supposed increases in revenue resulting from action in other cases, which, in addition to being outside the record, were erroneous in that the Commission had under-estimated the losses resulting from the reductions required by the Order in the present proceeding and had over-estimated supposed increases resulting from action taken in other cases and that, in truth and in fact, there were no other cases as a result of which, [fol. 792] by reason of the action taken by the Commission therein, any substantial increase in revenues would accrue to the said carriers.

26. The Commission found (Exhibit E, p. 678) that the granting of the request of Grand Forks, North Dakota, for the removal of the present transit charge at Grand Forks was "not warranted". However, as a part of its general plan in the whole proceeding, the Commission ordered that the Northern carriers cease making a separate charge for transit services.

27. Unless the order of the Commission be suspended and its enforcement enjoined pendente lite the petitioners will suffer irreparable injury.

Conclusions of Law

(1) The finding, which the Report contains, that the existing rates are unreasonable to the extent that they exceed

those prescribed, is insufficient to support the Order if the Commission misconstrued or misinterpreted the statute, proceeded upon a misconception of its powers and duties, considered matters outside the record, acted arbitrarily or unreasonably, or committed any other errors or mistake of law. Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452, 470; Southern Pacific R. R. Co. v. Interstate Commerce Commission, (the Willamette Valley case), 219 U. S. 433; Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541, 547; United States v. New York Central R. R. Co., (the Passenger Scrip case), 263 U. S. 603; Ann Arbor R. Co. v. United States, (the Deciduous Fruit case), 281 U. S. 658; United States v. Abilene & Southern Ry. Co., 265 U. S. 274; The Chicago Junction Case, 264 U. S. 258, 263; New England Division Case. 261 U. S. 184, 198, Note 19; Interstate Commerce Commission v. Louisville & Nashville Ry. [fol. 793] Co., 227 U. S. 88, 93; Atlantic Coast Line Ry. Co. v. Interstate Commerce Commission, 194 Fed. 449; Anchor Coal Co. v. United States, 25 F. [2d] 462.

(2) The Commission misconstrued and misinterpreted Section 15a of the Interstate Commerce Act and proceeded on an erroneous conception of its powers and duties thereunder.

(3) In considering the effect of the proposed reductions on the maintenance of an adequate system of transportation and in making its finding of fact in respect thereof, the Commission erroneously relied on and considered matters not of record in the procedings before it.

(4) By employing the lowest possible lawful rates as a standard for the measurement of either the existing rates or for the determination of reasonable maximum rates under Section 1, the Commission exceeded the powers conferred upon it by the Interstate Commerce Act.

(5) In prescribing the lowest possible lawful rates as maximum reasonable rates, the Commission established grain and grain products as a favored class, applied thereto standards of reasonableness other than and different from those provided by the Interstate Commerce Act for the determination of the reasonableness of rates on other commodities, and relieved the same of making their

proper contribution to the revenue requirements of Sec. 15a, contrary to the powers and duties imposed upon the Commission by the Interstate Commerce Act.

(6) The order of the Commission is based upon an erroneous interpretation of the effect of the Hoch-Smith Resolution upon its powers and duties.

(7) The order of the Commission is based upon an erroneous conception of its powers and duties under the Interstate Commerce Act.

[fols. 794-797] (8) The action of the Commission in denying the carriers' petitions for rehearing and by so doing in requiring the rates prescribed in its order to become effective in the future without any hearing or consideration of the changed conditions therein set forth, was taken in disregard and in violation of the duties imposed upon it by the Interstate Commerce Act, was arbitrary and unreasonable, constituted an abuse of its administrative discretion and was in excess of the authority conferred upon it by law, denied to the carriers a hearing or opportunity to be heard, and constituted a denial of due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

(9) Upon its face and upon the facts appearing from the petition, exhibits thereto, the answers and affidavits submitted upon this application, the order of the Commission is void.

(10) There is reasonable probability that the petitioners will succeed on final hearing.

(11) The order of the Commission should be suspended and set aside and its enforcement and operation enjoined pendente lite.

Respectfully submitted.

Frederick H. Wood, Walter McFarland, Elmer A. Smith, P. F. Gault, Douglas F. Smith, H. H. Larimore, J. N. Davis, A. B. Mason, R. J. Hagman, M. L. Countryman, Jr., R. S. Outlaw, Leslie Craven, Wm. D. Whitney, A. B. Enoch, Solicitors for Petitioners, Room 1025 La Salle Street Station, Chicago, Ill. W. F. Dickinson, O. W. Dynes, R. V. Fletcher, E. E. McInnis, Bruce Scott, of Counsel.

June 3, 1931.

[fol. 798] IN UNITED STATES DISTRICT COURT

In Equity. No. 10479

[Title omitted]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED ON BEHALF OF DEFENDANT INTERSTATE COMMERCE COMMISSION—Filed July 10, 1931

The defendant Interstate Commerce Commission submits the following proposed findings of fact and conclusions of law and requests the Court to adopt the same, as its Findings of Fact and Conclusions of Law, in compliance with Equity Rule 70½.

Findings of Fact

I

By its order dated March 12, 1925, the Interstate Commerce Commission, on its own motion, instituted a general investigation (designated Docket No. 17000) of the rate structures of common carriers subject to the Interstate Commerce Act, to determine whether rates, charges, regulations and practices were unjust, unreasonable, discriminatory or preferential, or otherwise in violation of law. Thereafter, orders were entered, whereby the investigation, so far as it related to rates on grain and grain products in the Western District, was designated Part VII [fol. 799] of said proceeding, and certain formal complaints assailing certain of said rates were consolidated for hearing therewith. (Exhibits A, C and D to Petition; Petition, Par. II.)

II

In the course of said proceeding and investigation, the Commission held hearings at a number of cities, extending over a period of one year and four months, voluminous testimony was taken amounting to 53,000 pages, and 2,100 exhibits were received in evidence. Petitioners herein participated in the proceedings and were accorded a full hearing. (Petition, par. VIII(d); Answer, par. IV; Rept. of Commission, p. 697, Exhibit E to Petition.)

Many state commissions, shippers, producers, chambers of commerce, etc., intervened in the proceeding and participated in the hearings.

III

As a result of said investigation and hearing and upon the record therein made, the said Commission made and entered its report, dated July 1, 1930, 164 I. C. C. 619, wherein it found and determined, among other things, as follows:

We find that the rates on wheat and coarse grains are unreasonable to the extent they exceed the rates prescribed in Appendix D. . . . (Rept. p. 652.)

. . . . . .

We find that the rates on wheat and coarse grains and their products are unreasonable to extent they exceed the rates prescribed in Appendix D. (Rept. p. 653.)

. . . . . .

We find that the present rates on wheat and coarse grains and their products are unreasonable and unduly preferential and prejudicial to the extent they exceed the rates prescribed in Appendix D, to be applied in accordance with the previous discussion herein as to rate break, relation of commodities, transit, etc., and subject to the later discussion herein of general issues or specific adjustments. [fol. 800] We further find that rates from other points to the same destinations are unreasonable to the extent they exceed rates made with reasonable relation to the rates from neighboring key points herein specifically prescribed.

We further find that rates between points between which rates have not been prescribed, specifically or by reasonable relation, are unreasonable to the extent they exceed rates made on the basis of the so-called interior scales shown in Appendix D.

Reasonable groupings of origin and destination points will be permitted. (Rept. p. 661.)

. . . . . .

. . . The carriers transit rules should provide for (a) a maximum of two free stops in transit (plus one inspection) of grain for storage, conditioning, and milling into its direct products, additional stops to be paid for at the rate of 2 cents per hundred pounds for each stop other than for inspection; (b) reasonable limitation of out-of-line and competitive routes and back hauls; and (c) elimination of little-used and obsolete transit provisions that serve mainly as a basis for unreasonable requests for transit and to bring censure upon transit tariffs generally. A stop at a primary market from which there are proportional rates will be viewed as any other transit stop. (Rept. p. 654.)

We find that present transit practices are unreasonable and unduly preferential and prejudicial to the extent they are not in harmony with the foregoing conclusions. (Rept. p. 654.)

. . . . . .

We find that the making of a separate charge for transit on the northern lines named, or parts of those lines, and the granting of transit without separate charge on other lines in the western district, or on other parts of the northern lines, subjects the shippers subject to the separate charge to undue prejudice and disadvantage and gives to shippers against whom no separate charge is made an undue preference and advantage, from which the northern lines should cease and desist by making no separate charge for transit. (Rept. pp. 654-655.)

Thereupon, the Commission made and entered an order, dated July 1, 1930, which referred to and made a part thereof, its report of that date. That order in words and figures, is, in part, as follows:

It is ordered, That all common carriers by railroad operating as such within continental United States, respondents in No. 17000, Part 7, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before October 1, 1930, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of grain and grain products, [fol. 801] on domestic shipments within the western dis-

trict (herein defined as the territory on and west of the Mississippi River, west of Lakes Superior and Michigan, and west of and including Illinois), and on export shipments from the western district, as herein described, and from Lake Erie ports, to Atlantic, Pacific, and Gulf ports, rates which exceed those prescribed in Appendix D to said report; and to cease and desist, on or before the date mentioned, and thereafter to abstain, from practices, including transit, not in accordance with the findings in said report.

It is further ordered, That said defendants, according as they may participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 1, 1930, upon notice to this commission and to the general public by not less than 20 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of grain and grain products within the territory described in the next preceding paragraph hereof rates which shall not exceed those prescribed in Appendix D of the said report, and practices which are in harmony with the findings in said report.

It is further ordered, That this order shall continue in force until the further order of the commission.

And it is further ordered, That the complaints listed in Appendix A be dismissed, and that the investigation and suspension proceedings listed therein be discontinued. (Rept. pp. 822-3.)

The Commission in its report stated the question presented in the proceeding as follows:

The question here presented is whether, under present conditions, the rates on grain and grain products throughout the western district are reasonable and just and are properly related to each other and to the rates on other traffic. The answer must take into account not only comparisons of distance, transportation conditions, and ton-mile and car-mile earnings on grain and other commodities, but also whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by law, including section 15a of the interstate commerce act, which we construe to permit, but not to guarantee, the carriers to earn 5.75 per cent on the

fair value of the property devoted to the transportation service. (Rept. p. 627.)

and concerning the scope of the issues, said:

The record requires a general survey of the rates on grain and grain products throughout the western district from the standpoint not only of cost, but of general transportation conditions as well. The relation of rates, as [fol. 802] well as the general level, is within the scope of the investigation. The discussion first will be mainly of wheat. It will be necessary in this connection to discuss general crop and marketing conditions in their relation to rates. (Rept. p. 631.)

IV

The Commission found that the average general level of the present rates on grain and grain products to and through the primary markets, and between points not made on the market combinations, differed not only in general territories, but in different localities in the same general territory. By using, as a convenient yardstick, the scale prescribed in another case for application on wheat and flour from Oklahoma to Louisiana, and taking that scale as 100 per cent, variations of from 57 to 149 per cent were shown in the rates for comparable distances between points generally in the Western District. (Rept. pp. 657-659.)

Measured by this scale, the Commission observed that many of the present rates were low, others were high, and that relative rate levels were not in entire accord with transportation conditions; that it was confronted with the fact that judged by the usual standards of transportation conditions some of the rates in the Western District, on both wheat and coarse grains, were too low, while others were too high.

Its judgment was that horizontal treatment of such rates would perpetuate these inconsistencies and it concluded that proper treatment would leave some of the rates as they were, reduce some, and increase others. (Rept. p. 659.)

V

The Commission further found that grave practices and abuses in respect of transit were disclosed by the record. [fol. 803] Its report discloses the following:

Transit is a common practice at both market and interior, milling points. It contemplates a through shipment at the through rate on the commodity offered for shipment, and, if strictly enforced, would require through billing at that rate. Storage in transit and other transit arrangements rest on the fiction that the incoming and outgoing transportation services, while distinct, are applied to a continuous shipment from point of origin to point of destination. (Rept. p. 655 and footnote 30.) It is accorded in connection with both at and proportional rates, over direct and indirect routes, frequently with extensive back-haul and out-of-line service and except in the Northwest, without charge other than that compensation included in the line-haul rate. (Back-haul, out-of-line haul and circuity are defined in footnote 25, p. 653 of Rept.) The transit stop is for a variety of purposes, including inspection, conditioning, storing, milling, feed mixing and partial unloading. Each carrier deals with requests for transit according to the fact in each case, there being no uniformity and no general rule on the subject. The existing transit practices were the subject of wide complaint upon the record made in the proceeding. (Rept. p. 653.)

An instance of transit abuse cited in the report as appearing in the record, is that of 30 cars of grain kept in transit in Texas for 100 days, transported 1500 miles, and finally delivered at a point 300 miles from the original shipping point, the movements of these cars including a virtual shuttle service between Dallas and Fort Worth to try those markets. (Rept. p. 654, footnote 27.)

It is estimated in the concurring opinion of one of the Commissioners that the cost to the railroads of this transit service is approximately $30,000,000 per annum. (Rept. p. 699.)

[fol. 804] To remedy the situation thus presented, which the Commission realized was a difficult one, it made requirements as follows:

* * * The carriers transit rules should provide for (a) a maximum of two free stops in transit (plus one inspection) of grain for storage, conditioning, and milling into its direct products, additional stops to be paid for at the rate of 2 cents per hundred pounds for each stop other than for inspection; (b) reasonable limitation of out-of-

line and competitive routes and back hauls; and (c) elimination of little-used and obsolete transit provisions that serve mainly as a basis for unreasonable requests for transit and to bring censure upon transit tariffs generally. A stop at a primary market from which there are proportional rates will be viewed as any other transit stop. Rept. p. 654.)

The Commission found that certain of the railroads in the northwest exacted a separate transit charge and in view thereof made a finding that the making of such a separate charge for transit on those lines, or parts of them, and the granting of transit without separate charge on other lines in the Western District, subject the shippers subject to such charge to undue prejudice and disadvantage and gave to the shippers against whom no separate charge is made an undue preference and advantage from which the northern lines should cease and desist by making no separate charge for transit. (Rept. pp. 654, 655.)

It also found unreasonable and unduly preferential, and directed the elimination of, the so-called unit rule, used particularly in connection with the manufacture of mixed feed, and under which the rate on mixed feed from the manufacturing point can be the balance of the through rate on any of its ingredients, and whatever the level of its rate, upon surrender of inbound expense bills covering an aggregate tonnage of that commodity equal to the outbound weight of the mixed feed, and even though the transit balance be nothing, due to the identity of rate to the point of manufacture and the final point of reshipped destination. (Rept. p. 656, 657; Comr. Porter's concurring opinion, p. 743.)

[fol. 805]

VI

It is shown in the Commission's report that there are three bases of rates available on wheat to and from primary markets, viz., (1) a combination of flat rates in and out; this is defined as a local rate of a single carrier or a joint rate of two or more carriers published as a unit, (2) a combination of flat rates in and proportional rates out, (a proportional rate is supposed to be a part of a through rate and usually lower than the flat rate between the same points; it is available and dependent upon a previous trans-

portation to, or subsequent transportation from, the point to which the rate applies), and (3) overhead rates with transit which is a flat or proportional rate under which shipments may be stopped at an intermediate point for marketing, milling, or other transit purpose. A transit balance is an incident of an overhead through rate with transit. Shipments thereunder are billed at the flat rate inbound to transit point and on the outbound shipment the amount paid is the difference between the through rate from origin to destination and the flat rate paid in to the transit point. (Rept. p. 633.)

Generally speaking, all shipments to markets are billed in at flat rates. Whether outbound shipments are at proportional rates or transit balances depends upon the selection of the inbound freight bill. If the inbound freight bill covers a shipment from an origin point from which there is no overhead rate with transit to final destination, the outbound shipment is at the proportional rate. But grain from a point from which there is no overhead rate with transit can, under present practice, be substituted for wheat from a point from which there is such an overhead rate with transit, and can be forwarded, upon presentation of the inbound expense bill covering inbound transportation from the latter point, at the transit balance due on that expense bill. (Rept. p. 634.)

[fol. 806] For many years through rail rates on grain and grain products have been largely the combination of flat rates to and proportional rates from primary markets, or the so-called rate-break combinations. (Rept. p. 634.) The rate-break through primary markets is not exclusively employed, however. There are many overhead through rates with transit at the primary markets lower than the combinations on the primary markets, and therefore, many transit balances less than the proportional rates. These overhead rates apply through markets on both direct and indirect routes. The proportional rate from one primary market to another is frequently made applicable with transit at an intermediate primary market, in lieu of the combination of proportional rates to and from the intermediate market. (Rept. p. 636.)

Because of overhead through rates less than the rate-break combinations, the proportional rates from and between the primary markets have come largely into a state of disuse. (Rept. p. 639.)

The propriety of the present dual system of proportional rates and transit balances from the markets is open to question from the standpoint of orderly tariff procedure. (Rept. p. 644.)

The transit balance at primary markets has always been a source of disorganization of rates. It gave rise to the proportional rate, as a result of carriers from the markets, not parties to the overhead rate, publishing the transit balance as a proportional rate. Certain of the carriers today publish what are known as varying proportional rates, restricted to apply only on grain from specified territories from which there are overhead through rates in which they do not participate. Just so long as transit balances remain a substantial factor in the adjustment of rates from the primary markets, just so long will there be undue preferences between outbound shippers, as well as general [fol. 806½] instability in rates resulting from shippers seeking the translation of transit balances into proportional rates. Prior to General Order No. 28 of the Director General of Railroads, rates were generally on the combination basis, and there was a minimum of complaint against this method of rate adjustment. A return as closely as practicable to that basis would go far toward eliminating much of the complaint that has arisen from time to time concerning the relation of rates through the various primary markets. The best interests not only of the primary markets, but of the producer, consumer, and carrier will be served by the fullest possible application of the rate-break combinations through primary markets. (Rept. p. 644, 645.)

The Commission found that the practice of contemporaneously charging both proportional rates and transit balances subjects the shipper under proportional rates to undue prejudice and disadvantage, and gives to the shipper under the lower transit balance an undue preference and advantage, from which the carriers will be required to cease and desist; that the through rates herein prescribed, on the basis of flat rates to the primary markets and proportional rates beyond, will be reasonable; and that overhead through rates less than those combinations should be cancelled. (Rept. p. 645.)

VII

The Commission also found that the rates on coarse grains in the plains states east of the Rocky Mountains, including the Southwest, were 90 per cent of the wheat rates (Rept. p. 626). The coarse grains are mainly corn, oats, rye and barley (Rept. p. 625).

It also found (Rept. p. 652):

[fol. 807] From a transportation standpoint there is no justification for rates on coarse grains 10 per cent lower than on wheat. Coarse grains load lighter than wheat. Perhaps the main argument in favor of the differential is the somewhat lower value. Substantial justice can best be done to shippers of both wheat and coarse grains by one rate on both classes of traffic. In this way wheat rates can be reduced to a level justified by the showing of this record as to wheat, and border-line discriminations between States can be best removed.

VIII

After the issuance and service of the report and order, and from time to time, numerous petitions were filed by the carriers affected, including petitioners, requesting rehearing, reargument and/or modifications of the Commission's order, but these were all denied. (Petition, par. XIII, Supplemental Rept., Exhibit F to Petition, p. 6.).

IX

On April 10, 1931, the Commission made a supplemental report, clarifying the findings in the original report, in some instances, and correcting and modifying them in others. On that date also, an order was entered which in part, is as follows (Exhibit F to Petition, p. 51):

It is ordered, That the said original report and order, the latter, as postponed in effective date, be, and they are hereby, corrected, modified and supplemented accordingly, to become effective on June 1, 1931, upon notice to this commission and to the general public of not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act.

X

There is no allegation nor claim made by petitioners that the rates prescribed by the Commission's orders are un-

reasonable; neither is there allegation or claim that these rates will not fully compensate the carriers for the trans-
[fol. 808] portation service rendered; further, there is no allegation or claim that under the existing rates grain and grain products in the Western District were not bearing more than their share of the traffic or transportation burden.

There is no claim that there was no substantial evidence to justify and warrant the findings and orders of the Commission. The evidence adduced in the proceeding before the Commission is not before this court.

Conclusions of Law

I

The Commission had jurisdiction to institute upon its own initiative these proceedings and to enter the order complained of. (Interstate Commerce Act as amended, Title 49, ch. 1, U. S. Code, Sections 1 (5), 3 (1) and 15 (1).)

II

The order complained of was and is consistent with and supported and justified by the findings contained in the Commission's report.

III

The findings of fact made by the Commission are conclusive upon the Court, since no claim is made that these findings are unsupported by the evidence and especially since the record upon which the Commission made its findings was not introduced in evidence in this suit. Assigned Car Cases, 274 U. S. 564, 583; Central R. R. Co. v. U. S., 257 U. S. 247, 256; I. C. C. v. Ill. Cent. R. R. Co., 215 U. S. 452, 470; Louisiana & Pine Bluff Ry Co. v. U. S., 257 U. S. 114, 116; Spiller v. A. T. & S. F. Ry. Co., 253 U. S. 117, 125; C. I. & L. Ry. Co. v. U. S., 270 U. S. 287, 295.

[fol. 809]

IV

The Court finds that the Commission did not misconstrue, misinterpret, or misapply the law applicable to the subject-matter involved in the proceeding before it, particularly that it did not misconstrue, misapply, or mis-

interpret the so-called Hoch-Smith Resolution; further, that the Commission gave proper consideration to, and made proper interpretation of, all the applicable law, including Section 15a (2), (3), of the Interstate Commerce Act.

V

The Court finds that there was no error of law or any irregularities in the proceedings before the Commission, or in the making of the findings and orders complained of; that the Commission did not exceed its power and authority therein; did not act arbitrarily or in disregard of any legal right of petitioners or others, parties to the proceedings.

VI

The Court finds that there was no abuse of discretion by the Commission in the denial of the several motions for rehearing, reargument, and/or modification of the Commission's findings and orders.

VII

The Court finds that the orders of the Commission was and is a valid exercise of its power and authority and that it should be confirmed.

VIII

The Court finds that the temporary restraining order should be dissolved, the application for temporary or inter- [fols. 810 & 811] locutory injunction should be denied, and the petition should be dismissed.

E. M. Reidy, H. L. Underwood, Attorneys for Interstate Commerce Commission. Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, of Counsel.

May, 1931.

[fol. 812] IN UNITED STATES DISTRICT COURT

In Equity. No. 10479

[Title omitted]

REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW BY PUBLIC SERVICE COMMISSION OF KANSAS—Filed May 26, 1931

1. The proceedings before the Interstate Commerce Commission were duly instituted and concluded as provided by Section 13 (2) of the Interstate Commerce Act, a full hearing was had, and the report and order were made and entered as in said section provided.

2. There was no lack of substantial evidence, no material irregularity, and no error in the application of the law by the Commission.

3. The Commission in making its report and order and in determining and prescribing the rates therein ordered did not exceed its constitutional or statutory authority.

4. The Commission's report and order are valid and enforceable, and the petitioners' application for an interlocutory injunction or other relief is denied.

5. The findings and recitals of fact, evidential and ultimate, are sufficient to support the order under Section 14 of the Interstate Commerce Act.

6. The record upon which the Commission's report and order was based had not become stale, unfit, or otherwise insufficient to support the order.

7. There is no statutory provision conferring any right upon the petitioners to have a case reopened before the Commission.

8. Whether a petition for reopening and rehearing a proceeding before the Commission should be granted or denied is for the sound discretion of the Commission only. None but the Commission knows the relative values assigned to each of the innumerable facts considered in the [fol. 813] determination of reasonable rates, and none but the Commission can determine the effect upon its decision of the alleged facts set up in such a petition.

9. The Commission did not abuse its discretion nor act in an arbitrary manner in denying the carriers' petitions for rehearing.

10. The Commission did not base its report or order upon evidence or matter outside the record before it.

11. The matters referred to by petitioners as being mentioned in the Commission's report but alleged not to be in the record before it have not been shown to be material or that the Commission's decision was to any extent whatsoever based thereon.

12. The Commission did not disregard or fail fully to perform any affirmative duty imposed upon it by law.

13. The Commission in its report and order did not fail to discharge its duty under Section 15-a of the Interstate Commerce Act and did not in any particular ignore the facts of record bearing upon its duty under said section, or act upon any misconstruction of said section.

14. The Commission in its report and order took into account the provisions of Section 15-a and gave them such force and effect as was proper in view of the record before it and the other affirmative provisions of the Act, and the Commission's report indicates that it proceeded under a proper construction of said section as determined by the decisions of the courts thereon.

15. The failure of the petitioning carriers to earn as a group the so-called fair return contemplated by said Section 15-a does not of itself operate to prevent the reduction of the rates considered by the Commission, from an unreasonable to a reasonable level, as required by Section 1 of the Interstate Commerce Act.

16. Even if the carriers' revenue since the record in the case before the Commission was closed had, as alleged, declined so that the rate of return was reduced, that alone would not as a matter of law prevent the prescribed reduction of rates. The Court may not substitute its judgment for that of the Commission.

17. It cannot be held that under the provisions of Section 15-a the Commission deliberately, willfully, or arbitrarily denied the several petitions for a reopening, but

on the contrary the Commission acted wholly within its power, right, and discretion in refusing a rehearing based upon said petitions.

18. Petitioners have failed to show that the Commission in determining the prescribed rates acted upon an erroneous construction of the Hoch-Smith Resolution or that in ignorance or deliberate intent it ignored or disregarded the judicial construction of said resolution.

19. The Commission in making its report and order proceeded upon the assumption that the Hoch-Smith Resolu-
[fols. 814 & 815] tion made no change in the pre-existing law with respect to the standards governing the reasonableness and lawfulness of rates.

20. The Commission in making its order and decision ordered reductions only in rates that were unreasonable and unlawful under sections 1 and 15-a of the Interstate Commerce Act and prescribed reasonable rates for the future based upon the evidence and the standards of the Interstate Commerce Act.

21. The Commission in its report and order required changes in the relationship of rates only when such relationships were unduly prejudicial or unreasonably preferential, or unduly discriminatory against intrastate commerce, in violation of the Interstate Commerce Act.

22. The Commission in its report and order did not reduce rates for the purpose of relieving the condition of any industry, but only gave consideration to such condition as a factor in determining the reasonableness and lawfulness of the rates under the Interstate Commerce Act.

23. Rate orders are not res adjudicata and upon different issues and different records the Commission may, and in duty must, modify rates previously prescribed by it as reasonable and lawful if in its judgment such changes are proper.

24. The petitioners do not assert any lack of evidence before the Commission and have failed to establish any material irregularity in the Commission's proceedings or any misapplication of law by the Commission, and their bill is dismissed for want of equity.

Wherefore your interveners ask that the findings and conclusions numbered 1 to 24 inclusive herein be found and determined to be true and lawful under the facts applicable and the law governing the matters herein involved.

(Signed) E. H. Hatcher, (Signed) C. W. Steiger,
Topeka, Kansas; Solicitors for Interveners.

[fol. 816] IN UNITED STATES DISTRICT COURT

In Equity. No. 10479

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL., Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW—June 30, 1931

Findings of Fact

I

By its order dated March 12, 1925, the Interstate Commerce Commission, on its own motion, instituted a general investigation (designated Docket No. 17000) of the rate structures of common carriers subject to the Interstate Commerce Act, to determine whether rates, charges, regulations and practices were unjust, unreasonable, discriminatory or preferential, or otherwise in violation of law. Thereafter, orders were entered, whereby the investigation, so far as it related to rates on grain and grain products in the Western District, was designated Part VII of said proceeding, and certain formal complaints assailing certain of said rates were consolidated for hearing therewith (exhibits A, C and D to Petition; Petition, Par. II).

[fol. 817] II

In the course of said proceeding and investigation, the Commission held hearings at a number of cities, extending over a period of one year and four months, voluminous

testimony was taken amounting to 53,000 pages, and 2,100 exhibits were received in evidence. Petitioners herein participated in the proceedings and were accorded a full hearing. (Petition, par. VIII (d); Answer, par. IV; Rept. of Commission, p. 697, Exhibit E to Petition.)

Many state commissions, shippers, producers, chambers of commerce, etc., intervened in the proceeding and participated in the hearings.

III

As a result of said investigation and hearing and upon the record therein made, the said Commission made and entered its report, dated July 1, 1930, 164 I. C. C. 619, wherein it found and determined, among other things, as follows:

We find that the rates on wheat and coarse grains are unreasonable to the extent they exceed the rates prescribed in Appendix D. * * * (Rept. p. 652.)

* * * * * * * * *

We find that the rates on wheat and coarse grains and their products are unreasonable to extent they exceed the rates prescribed in Appendix D. (Rept. p. 653.)

* * * * * * * * *

We find that the present rates on wheat and coarse grains and their products are unreasonable and unduly preferential and prejudicial to the extent they exceed the rates prescribed in Appendix D, to be applied in accordance with the previous discussion herein as to rate break, relation of commodities, transit, etc., and subject to the later discussion herein of general issues or specific adjustments.

* * * * * * * * *

We further find that rates from other points to the same destinations are unreasonable to the extent they exceed rates made with reasonable relation to the rates from neighboring key points herein specifically prescribed.

[fol. 818] We further find that rates between points between which rates have not been prescribed, specifically or by reasonable relation, are unreasonable to the extent they

exceed rates made on the basis of the so-called interior scales shown in Appendix D.

Reasonable groupings of origin and destination points will be permitted. (Rept. p. 66[illegible])

* * * * * * * *

* * * The carriers transit rules should provide for (a) a maximum of two free stops in transit (plus one inspection) of grain for storage, conditioning, and milling into its direct products, additional stops to be paid for at the rate of 2 cents per hundred pounds for each stop other than for inspection; (b) reasonable limitation of out-of-line and competitive routes and back hauls; and (c) elimination of little-used and obsolete transit provisions that serve mainly as a basis for unreasonable requests for transit and to bring censure upon transit tariffs generally. A stop at a primary market from which there are proportional rates will be viewed as any other transit stop. (Rept. p. 654.)

We find that present transit practices are unreasonable and unduly preferential and prejudicial to the extent they are not in harmony with the foregoing conclusions. (Rept. p. 654.)

* * * * * * * *

We find that the making of a separate charge for transit on the northern lines named, or parts of those lines, and the granting of transit without separate charge on other lines in the western district, or on other parts of the northern lines, subjects the shippers subject to the separate charge to undue prejudice and disadvantage and gives to shippers against whom no separate charge is made an undue preference and advantage, from which the northern lines should cease and desist by making no separate charge for transit. (Rept. pp. 654-655.)

Thereupon, the Commission made and entered an order, dated July 1, 1930, which referred to and made a part thereof, its report of that date. That order in words and figures, is, in part, as follows:

It is ordered, That all common carriers by railroad operating as such within continental United States, respondents in No. 17000, Part 7, according as they partici-

pate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before October 1, 1930, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of grain and grain products, on domestic shipments within the western district (herein defined as the territory on and west of the Mississippi River, west of Lakes Superior and Michigan, [fol. 819] and west of and including Illinois), and on export shipments from the western district, as herein described, and from Lake Erie ports, to Atlantic, Pacific, and Gulf ports, rates which exceed those prescribed in Appendix D to said report; and to cease and desist, on or before the date mentioned, and thereafter to abstain, from practices, including transit, not in accordance with the findings in said report.

It is further ordered, That said defendants, according as they may participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 1, 1930, upon notice to this commission and to the general public by not less than 20 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of grain and grain products within the territory described in the next preceding paragraph hereof rates which shall not exceed those prescribed in Appendix D of the said report, and practices which are in harmony with the findings in said report.

It is further ordered, That this order shall continue in force until the further order of the commission.

And it is further ordered, That the complaints listed in Appendix A be dismissed, and that the investigation and suspension proceedings listed therein be discontinued. (Rept. pp. 822-3.)

The Commission in its report stated the question presented in the proceedings as follows:

The question here presented is whether, under present conditions, the rates on grain and grain products throughout the western district are reasonable and just and are properly related to each other and to the rates on other traffic. The answer must take into account not only comparisons of distance, transportation conditions, and ton-

mile and car-mile earnings on grain and other commodities, but also whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by law, including section 15a of the interstate commerce Act, which we construe to permit, but not to guarantee, the carriers to earn 5.75 per cent on the fair value of the property devoted to the transportation service. (Rept. p. 627.)

and concerning the scope of the issues, said:

The record requires a general survey of the rates on grain and grain products throughout the western district from the standpoint not only of cost, but of general transportation conditions as well. The relation of rates, as well as the general level, is within the scope of the investigation. The discussion first will be mainly of wheat. It will be [fol. 820] necessary in this connection to discuss general crop and marketing conditions in their relation to rates. (Rept. p. 631.)

IV

The Commission found that the average general level of the present rates on grain and grain products to and through the primary markets, and between points not made on the market combinations, differed not only in general territories, but in different localities in the same general territory. By using, as a convenient yardstock, the scale prescribed in another case for application on wheat and flour from Oklahoma to Louisiana, and taking that scale as 100 per cent, variations of from 57 to 149 per cent were shown in the rates for comparable distances between points generally in the Western District. (Rept. pp. 657-659.)

Measured by this scale, the Commission observed that many of the present rates were low, others were high, and that relative rate levels were not in entire accord with transportation conditions; that it was confronted with the fact that judged by the usual standards of transportation conditions some of the rates in the Western District, on both wheat and coarse grains, were too low, while others were too high.

Its judgment was that horizontal treatment of such rates would perpetuate these inconsistencies and it concluded that proper treatment would leave some of the rates

as they were, reduce some, and increase others. (Rept. p. 659.)

V

The Commission further found that grave practices and abuses in respect of transit were disclosed by the record. Its report discloses the following:

Transit is a common practice at both market and interior milling points. It contemplates a through shipment at the [fol. 821] through rate on the commodity offered for shipment, and, if strictly enforced, would require through billing at that rate. Storage in transit and other transit arrangements rest on the fiction that the incoming and outgoing transportation services, while distinct, are applied to a continuous shipment from point of origin to point of destination. (Rept. p. 655 and footnote 30.) It is accorded in connection with both flat and proportional rates, over direct and indirect routes, frequently with extensive back-haul and out-of-line service and except in the Northwest, without charge other than the compensation included in the line-haul rate. (Back-haul, out-of-line haul and circuity are defined in footnote 25, p. 653 of Rept.) The transit stop is for a variety of purposes, including inspection, conditioning, storing, milling, feed mixing and partial unloading. Each carrier deals with requests for transit according to the fact in each case, there being no uniformity and no general rule on the subject. The existing transit practices were the subject of wide complaint upon the record made in the proceeding. (Rept. p. 653.)

An instance of transit abuse cited in the report as appearing in the record, is that of 30 cars of grain kept in transit in Texas for 100 days, transported 1500 miles, and finally delivered at a point 300 miles from the original shipping point, the movements of these these cars including a virtual shuttle service between Dallas and Fort Worth to try those markets. (Rept. p. 654, footnote 27.)

It is estimated in the concurring opinion of one of the Commissioners that the cost to the railroads of this transit service is approximately $30,000,000 per annum. (Rept. p. 699.)

[fol. 822] To remedy the situation thus presented, which

the Commission realized was a difficult one, it made requirements as follows:

* * * The carriers transit rules should provide for (a) a maximum of two free stops in transit (plus one inspection) of grain for storage, conditioning, and milling into its direct products, additional stops to be paid for at the rate of 2 cents per hundred pounds for each stop other than for inspection; (b) reasonable limitation of out-of-line and competitive routes and back hauls; and (c) elimination of little-used and obsolete transit provisions that serve mainly as a basis for unreasonable requests for transit and to bring censure upon transit tariffs generally. A stop at a primary market from which there are proportional rates will be viewed as any other transit stop. (Rept. p. 654.)

The Commission found that certain of the railroads in the northwest exacted a separate transit charge and in view thereof made a finding that the making of such a separate charge for transit on those lines, or parts of them, and the granting of transit without separate charge on other lines in the Western District, subjected the shippers subject to such charge to undue prejudice and disadvantage and gave to the shippers against whom no separate charge is made an undue preference and advantage from which the northern lines should cease and desist by making no separate charge for transit. (Rept. pp. 654, 655.)

It also found unreasonable and unduly preferential, and directed the elimination of, the so-called unit rule, used particularly in connection with the manufacture of mixed feed, and under which the rate on mixed feed from the manufacturing point can be the balance of the through rate on any of its ingredients, and whatever the level of its rate, upon surrender of inbound expense bills covering an aggregate tonnage of that commodity equal to the outbound weight of the mixed feed, and even though the transit balance be nothing, due to the identity of rate to the point of [fol. 823] manufacture and the final point of reshipped destination. (Rept. p. 656, 657; Comr. Porter's concurring opinion, p. 743.)

VI

It is shown in the Commissi[illegible]eport that there are three bases of rates available on w[illegible] to and from primary

markets, viz., (1) a combination of flat rates in and out; this is defined as a local rate of a single carrier or a joint rate of two or more carriers published as a unit, (2) a combination of flat rates in and proportional rates out (a proportional rate is supposed to be a part of a through rate and usually lower than the flat rate between the same points; it is available and dependent upon a previous transportation, to or subsequent transportation from, the point to which the rate applies), and (3) overhead rates with transit which is a flat or proportional rate under which shipments may be stopped at an intermediate point for marketing, milling, or other transit purposes. A transit balance is an incident of an overhead through rate with transit. Shipments thereunder are billed at the flat rate inbound to transit point and on the outbound shipment the amount paid is the difference between the through rate from origin to destination and the flat rate paid in to the transit point. (Rept. p. 633.)

Generally speaking, all shipments to markets are billed in at flat rates. Whether outbound shipments are at proportional rates or transit balances depends upon the selection of the inbound freight bill. If the inbound freight bill covers a shipment from an origin point from which there is no overhead rate with transit to final destination, the outbound shipment is at the proportional rate. But grain from a point from which there is no overhead rate with transit can, under present practice, be substituted for wheat from a point from which there is such an overhead rate with transit, and can be forwarded, upon presentation [fol. 824] of the inbound expense bill covering inbound transportation from the latter point, at the transit balance due on that expense bill. (Rept. p. 634.)

For many years through rail rates on grain and grain products have been largely the combination of flat rates to and proportional rates from primary markets, or the so-called rate-break combinations. (Rept. p. 634.) The rate-break through primary markets is not exclusively employed, however. There are many overhead through rates with transit at the primary markets lower than the combinations on the primary markets, and therefore, many transit balances less than the proportional rates. These overhead rates apply through markets on both direct and indirect routes. The proportional rate from one primary

market to another is frequently made applicable with transit at an intermediate primary market, in lieu of the combination of proportional rates to and from the intermediate market. (Rept. p. 636.)

Because of overhead through rates less than the rate-break combinations, the proportional rates from and between the primary markets have come largely into a state of disuse. (Rept. p. 639.)

The propriety of the present dual system of proportional rates and transit balances from the markets is open to question from the standpoint of orderly tariff procedure. (Rept. p. 644.)

The transit balance at primary markets has always been a source of disorganization of rates. It gave rise to the proportional rate, as a result of carriers from the markets, not parties to the overhead rate, publishing the transit balance as a proportional rate. Certain of the carriers today publish what are known as varying proportional rates, restricted to apply only on grain from specified ter- [fol. 825] ritories from which there are overhead through rates in which they do not participate. Just so long as transit balances remain a substantial factor in the adjustment of rates from the primary markets, just so long will there be undue preferences between outbound shippers, as well as general instability in rates resulting from shippers seeking the translation of transit balances into proportional rates. Prior to General Order No. 28 of the Director General of Railroads, rates were generally on the combination basis, and there was a minimum of complaint against this method of rate adjustment. A return as closely as practicable to that basis would go far toward eliminating much of the complaint that has arisen from time to time concerning the relation of rates through the various primary markets. The best interests not only of the primary markets, but of the producer, consumer, and carrier will be served by the fullest possible application of the rate-break combinations through primary markets. (Rept. p. 644, 645.)

The Commission found that the practice of contemporaneously charging both proportional rates and transit balances subjects the shipper under proportional rates to undue prejudice and disadvantage, and gives to the shipper under the lower transit balance an undue preference and

advantage, from which the carriers will be required to cease and desist; that the through rates herein prescribed, on the basis of flat rates to the primary markets and proportional rates beyond, will be reasonable; and that overhead through rates less than those combinations should be cancelled. (Rept. p. 645.)

VII

The Commission also found that the rates on coarse grains in the plains states east of the Rocky Mountains, including the Southwest, were 90 per cent of the wheat rates. (Rept. p. 626.) The coarse grains are mainly corn, [fol. 826] oats, rye and barley. (Rept. p. 625.)

It also found (Rept. p. 652):

From a transportation standpoint there is no justification for rates on coarse grains 10 per cent lower than on wheat. Coarse grains load lighter than wheat. Perhaps the main argument in favor of the differential is the somewhat lower value. Substantial justice can best be done to shippers of both wheat and coarse grains by one rate on both classes of traffic. In this way wheat rates can be reduced to a level justified by the showing of this record as to wheat, and border-line discriminations between States can be best removed.

VIII

After the issuance and service of the report and order, and from time to time, numerous, petitions were filed by the carriers affected, including petitioners, requesting rehearing, reargument and/or modifications of the Commission's order, but these were all denied. (Petition, par. XIII, Supplemental Rept., Exhibit F to Petition, p. 6.)

IX

On April 10, 1931, the Commission made a supplemental report, clarifying the findings in the original report, in some instances, and correcting and modifying them in others. On that date also, an order was entered which in part, is as follows (Exhibit F to Petition, p. 51):

It is ordered, That the said original report and order, the latter, as postponed in effective date, be, and they are

hereby, corrected, modified and supplemented accordingly, to become effective on June 1, 1931, upon notice to this commission and to the general public of not less than 15 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act.

[fol. 827] X

There is no allegation nor claim made by petitioners that the rates prescribed by the Commission's orders are unreasonable; neither is there allegation or claim that those rates will not fully compensate the carriers for the transportation service rendered; further, there is no allegation or claim that under the existing rates grain and grain products in the Western District were not bearing more than their share of the traffic or transportation burden.

There is no claim that there was no substantial evidence to justify and warrant the findings and orders of the Commission. The evidence adduced in the proceeding before the Commission is not before this court.

Conclusions of Law.

I

The Commission had jurisdiction to institute upon its own initiative these proceedings and to enter the order complained of. (Interstate Commerce Act as amended, Title 49, ch. 1, U. S. Code, Sections 1 (5), 3 (1) and 15 (1).)

II

The order complained of was and is consistent with and supported and justified by the findings contained in the Commission's report.

III

The findings of fact made by the Commission are conclusive upon the Court, since no claim is made that these findings are unsupported by the evidence and especially since the record upon which the Commission made its findings was not introduced in evidence in this suit. Assigned [fol. 828] Car Cases, 274 U. S. 564, 583; Central R. R. Co. v U. S., 257 U. S. 247, 256; I. C. C. v. Ill. Cent. R. R. Co., 215 U. S. 452, 470; Louisiana & Pine Bluff Ry. Co. v. U. S.,

257 U. S. 114, 116; Spiller v. A. T. & S. F. Ry. Co., 253 U. S. 117, 125; C. I. & L. Ry. Co. v. U. S. 270 U. S. 287, 295.

IV

The Court finds that the Commission did not misconsture, misinterpret, or misapply the law applicable to the subject-matter involved in the proceeding before it, particularly that it did not misconstrue, misapply, or misinterpret the so-called Hoch-Smith Resolution; further, that the Commission gave proper consideration to, and made proper interpretation of, all the applicable law, including Section 15a (2), (3), of the Interstate Commerce Act.

V

The Court finds that there was no error of law or any irregularities in the proceedings before the Commission, or in the making of the findings and orders complained of; that the Commission did not exceed its power and authority therein; did not act arbitrarily or in disregard of any legal right of petitioners or others, parties to the proceedings.

VI

The Court finds that there was no abuse of discretion by the Commission in the denial of the several motions for rehearing, reargument, and/or modification of the Commission's findings and orders.

VII

The Court finds that the orders of the Commission was and is a valid exercise of its power and authority and that it should be confirmed.

[fols. 829 & 830]

VIII

The Court finds that the temporary restraining order should be dissolved, the application for temporary or interlocutory injunction should be denied.

William M. Sparks, U. S. Circuit Judge. Charles E. Woodward, U. S. District Judge.

[fol. 831] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity. No. 10479

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al.

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

OPINION UPON MOTION FOR TEMPORARY INJUNCTION—Filed July 6, 1931

Before Sparks, Circuit Judge; Lindley, District Judge, and Woodward, District Judge

LINDLEY, District Judge:

Plaintiffs, carriers in the Western District, seek to enjoin, pending final hearing of this cause, an order of the Interstate Commerce Commission entered July 1, 1930, and one of supplemental character entered April 10, 1931, in a proceedings, instituted by the Commission of its own motion, involving an investigation of the rate structure relating to grain and grain products within said district and for export. The proceedings were part of a general inquiry into and examination of the rate structure of all carriers subject to the Interstate Commerce Act, instituted in 1925 pursuant to the direction of Congress in the Hoch-Smith resolution. In the investigation there were consolidated with the branch here concerned various com-[fol. 832] plaints and other proceedings involving related subjects.

In its report the Commission stated that the question presented is whether, "under present conditions, the rates on grain and grain products throughout the western district are reasonable and just and are properly related to each other and to the rates on other traffic. The answer must take into account not only comparisons of distance, transportation conditions, and ton-mile and car-mile earnings on grain and other commodities, but also whether the general level of rates on all traffic as a whole is sufficiently

high to accord to the carriers the rate of return contemplated by law, including section 15a of the interstate commerce act, which we construe to permit, but not to guarantee, the carriers to earn 5.75 per cent on the fair value of the property devoted to the transportation service" and that the "record requires a general survey of the rates on grain and grain products throughout the western district from the standpoint not only of cost, but of general transportation conditions as well. The relation of rates, as well as the general level, is within the scope of the investigation."

The Commission found that the existing rates were unreasonable and in many respects preferential or prejudicial and that certain practices on the part of the carriers were improper and resulted in undue injury to the railroads and to other interested parties. Consequently it directed that the carriers desist from an enforcement of rates upon grain in excess of those therewith prescribed and from certain practices not in accord with the report and that they establish the prescribed rates on or before October 1, 1930, a date extended by the second order to June 1, 1931. Petitions for re-hearing were denied. The present suit to set aside the orders followed, and we have presented now the motion for temporary injunction made therein.

We are not concerned with the wisdom or expediency of [fol. 833] the order; nor may be substitute our judgment for that of the Commission. The latter is charged with the administrative duty of determining whether rates and practices are reasonable, prejudicial or preferential, and its orders entered in such capacity are conclusive unless there is lack of substantial evidence to support them or unless they are beyond the scope of the Commission's power or invalid because of other error of law. Central R. R. Co. v. U. S. 257 U. S. 247; I. C. C. v. I. C. R. R. 215 U. S. 452; Skinner, etc. Corp. v. U. S. 249 U. S. 557; Assigned Car Cases, 274 U. S. 564; U. S. v. New River Co. 265 U. S. 533. In view of the absence of the evidence heard by the Commission, therefore, there is presented no question as to the sufficiency thereof, to support the findings. Spiller v. A. T. & S. F. Ry. Co. 253 U. S. 117; La. & P. B. Ry. Co. v. U. S. 257 U. S. 114. There is left to our consideration only such legal questions as arise upon the fact of the report, the order and the pleadings herein.

Sections 1 (5) and 3 (1) of the Interstate Commerce act direct that all transportation charges shall be reasonable and just and forbid unjust, unreasonable, discriminatory, preferential and prejudicial rates and practices and denominates them as unlawful. Section 15 (1) grants to the Commission power to determine whether any rates are unlawful in the sense of that word as used in Sections 1 (5) and 3 (1); to determine what charges, classification and practices will be fair, just and reasonable; to order that carriers shall desist from unlawful charges and to establish and enforce those found to be in accordance with the act.

Section 15a (2) and (3) provides that rates shall be such that the returns therefrom, under honest, efficient and economical management and maintenance, will be "as nearly as may be" a fair return upon the aggregate value of the property used in the service; that the Commission shall have reasonable latitude to modify any particular unjust or unreasonable rate; that it shall publish the percentage [fol. 834] considered by it to furnish the aforesaid fair return and that in such determination it shall give consideration, "among other things" to the transportation needs of the country and the necessity of enlarging carrier facilities to provide an adequate transportation. The percentage heretofore found to furnish the desired return is 5¾.

The Hoch-Smith resolution directed the Commission to make a thorough investigation of the carrier's rate structure in order to determine whether then existing rates and practices were unlawful; to make, "in accordance with the law," such changes and redistributions as found necessary to correct defects found to exist; to consider, in its proceedings, the comparative commodity market levels and the maintenance of an adequate system; from time to time as expeditiously as possible to make such decisions as it found appropriate upon the record then made and to effect "with the least practicable delay" such lawful charges as will promote the freedom of movement of farm products.

The Commission devoted 261 days to the hearing of the part of the general investigation here involved, considering testimony covering 53,000 pages and 2,100 exhibits. No part of that evidence is before the court. The Commission found that the average "present rates" on grain and grain

products differ "not only in general territories but in different localities in the same general territory," that such particular rates vary between a range of 57 to 149 per cent of an accepted standard; that many rates are too low, others too high and relative rates not in entire accord with transportation conditions; that horizontal treatment of existing rates should perpetuate these inconsistencies and that some rates should be reduced, some increased and some left unchanged.

The Commission found that the rates on grain and its products are unreasonable, unduly preferential and prejudicial to the extent that they differ from the schedule [fol. 835] ordered established; that transit practices are not uniform but are unreasonable and preferential; result in discrimination and should be restricted to two free stops, and that shippers should pay for additional stops at the rate of two cents per hundred pounds. Various specific findings as to transit conditions were included in the report. One of the Commissioners stated that the approximate cost of the present system of free transits to the railroads in the territory under consideration is $30,000,000 per year.

If we accept the statement of the Commission itself, it proceeded upon the assumption that by the resolution aforesaid it was its duty to undertake the tremendous task of reconsideration of the entire rate structure and traffic practice of the country and with the aid of the parties compiled a record which presented a complete view of grain rates and traffic practices in relation thereto in the western district, which supplied the facts necessary to an intelligent consideration and revision thereof. Without discussing the many details of the report, it seems obvious from our examination of same that the Commission was attempting to exercise its administrative functions in good faith under the law, upon voluminous evidence submitted. And, as suggested, in the absence of such evidence, we must assume that it was sufficient to sustain the finding that rates upon grain and grain products are unjust and unreasonable and traffic practices in relation thereto preferential and discriminatory.

The report includes a finding that plaintiffs are not earning the percentage heretofore published as sufficient to sustain an adequate transportation. Instead of 5¾%, the

carriers in the western district have earned since 1921 not more than 4.45% (as in 1926) and as little as 3.12% (as in 1921). The earning for 1927 was 3.92%. In a recent report the Commission remarked that "The railroads have never been able, since 1920, to obtain the aggregate earn- [fol. 836] ings contemplated by section 15a, and they are faced with continually increasing competition from other forms of transportation."

Plaintiffs contend that the Commission is without jurisdiction to establish rates upon grain which it claims will deprive it of many millions of dollars in revenue when the return of 5¾% is not being earned; that sec. 15a puts upon the Commission the duty of initiating such rates as "will, as nearly as may be" earn such return; that "will" implies not mere permission but insures "so far as possible, without direct guaranty" that statutory fair return and that the Commission treated the statutory provisions as granting to it mere permission and thereby committed error in failing to follow the legislative mandate.

Even though we were to accept the proposition that the purpose of the statute was to furnish, so far as possible, an insurance of such rates as will furnish the statutory return, we would still be confronted with the fact that though the Commission discussed and considered that the return is below what it believed to be a fair one, yet, in view of other evidence, it found the particular rates and practices unreasonable, preferential and prejudicial; that it was dealing with only one branch of the rate structure and that it arrived at its conclusion as to the specific rates and practices involved after its stated consideration of all evidence bearing upon the questions affecting the rates. We are, therefore, without right to conclude that the Commission deliberately ignored the subject of adequate return. We must assume that the evidence as a whole was sufficient to sustain the finding.

Plaintiff's contention in effect is that the Commission is without power to modify existing particular rates, admittedly not producing a fair return, so as to warrant a reduction in revenue. We do not so construe the act. Though upon a nation-wide revision of rate structure as to all commodities the law may wisely and properly require that such structure must be so built in all its details as [fol. 837] eventually to furnish a fair return, i. e. such a

return as will support an adequate transportation system, it does not follow in our opinion, that in a proceeding involving the rate structure of only certain commodities, the Commission may not reduce such rates on such commodities as it finds to be unlawful, even though the present return is not a fair one. Section 15a (2) seems to warrant such action as to particular rates, assuming always that the evidence supports the finding of unlawfulness, and the Supreme Court seems so to hold.

Thus in Dayton-Goose Creek Ry. Co. v. U. S., 263 U. S. 456, "The statute does not require that the net return from all the rates shall affect the reasonableness of a particular rate or a class of rates. In such an inquiry, the Commission may have regard to the service done, its intrinsic cost, or a comparison of it with other rates and need not consider the total net return at all. Paragraph 17 of section 15a, makes this clear." * * * "Where the reasonableness of one rate or a class of rates is in issue, the total operating profit of the railroad or public utility is of little use in reaching a conclusion. This is shown by the words of Mr. Justice Lamar, speaking for the Court, in Interstate Commerce Commission v. Union Pacific R. R. Co. (p. 549):

"'Where the rates as a whole are under consideration there is a possibility of deciding with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article.'"

If this language be obiter dictum, as insisted by plaintiffs we shall leave announcement to that effect to the Supreme Court.

[fol. 838] Plaintiffs assert that in reaching its conclusions the Commission was guided by standards other than those of the law, in other words, by the provisions of the Hoch-Smith resolution of Congress which directed the Commission in view of the agricultural depression, to effect such

changes in the rate structure as will promote freedom of movement of farm products at the lowest possible rate compatible with the maintenance of adequate transportation service. It is plaintiff's theory that the Commission construed the resolution as placing agricultural products in a "most favored" class and justifying reduction of rates thereon, even tho' the same were already reasonable and as requiring it to set up a zone of reasonableness and to establish such rates at the lowest possible point of said zone.

Were we able to conclude from what is before us that the plaintiffs are correct in assuming that the Commission adopted a standard other than that created by law, we would necessarily be impelled to enjoin the order, for no mandate of the Commission based upon a mistake of law or founded upon standards other than those of the Interstate Commerce law can be allowed to stand. I. C. C. v. N. P. R. R. Co. 222 U. S. 541; I. C. C. v. I. C. R. R. Co., 215 U. S. 452. And in Ann Arbor R. R. Co. v. U. S. 281 U. S. 658, the Supreme Court pointed out that the resolution "does not purport to make any change in the existing law, but on the contrary requires that that law be given effect. Nor does it purport to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law." In that case the court found that the Commission had by its construction, been led astray and guided by an improper construction of the resolution and set aside the order.

But we find here no evidence that the Commission was so misled. The case last cited was decided prior to the entry of the order, and the Commission said concerning the same: [fol. 839] "The Supreme Court of the United States recently interpreted the Hoch-Smith resolution as setting up no standard of reasonableness of rate level or relation other than that already provided by the interstate commerce act. Ann Arbor Railroad Company v. United States, (281 U. S. 658), decided June 2, 1930. The findings herein are under the provisions of the interstate commerce act." This language, adopted unanimously by the eleven members, is definite notice to the parties that the Commission had no misconception as to its duty; that if it made any mistake, such was one of fact with which we are not concerned.

Plaintiffs contend further that the language of the concurring opinions of certain members of the Commission

clearly sustain its contention that the order was based upon the Hoch-Smith resolution in a manner condemned by the Supreme Court in the Ann Arbor case. We do not understand that the utterance of individual members in a separate opinion can be utilized to invalidate the report of the Commission but that such separate statements may be read in connection with the expressions of the report and its expressed or tacit admissions, in order to determine to just what the Commission gave consideration. But here we are met with the unconditional statement in the report that the Commission had in contemplation the holding of the Supreme Court in the Ann Arbor case and that it was following the teaching thereof by making its findings under the law instead of under any alleged wrongful standard of the resolution. Furthermore, this statement, adopted by the complete Commission is effective refutation of plaintiffs' contention that certain individual members' statements, alleged to be indicative of a desire to adopt a standard other than the lawful one went unchallenged.

When we consider the expressions of the concurring commissioners we find no convincing evidence therein that the members put upon the Hoch-Smith resolution any construc-
[fol. 840]. tion other than that held by the Supreme Court to be authorized. When one of them said that the presented rates "lie within the zone of reasonableness but are the lowest rates on this traffic which can be lawfully presented," we conclude only that he evidently believed that the rates were "lawfully" prescribed as defined in the Ann Arbor case and his "zone of reasonableness" must have been that mentioned by the Supreme Court in Am. Express Co. v. S. D. 244 U. S. 617 where in discussing two rates, it said: "Such rates may lie within the zone of reasonableness and yet involve unjust discrimination." The statement of another Commissioner construed by plaintiffs to mean that in voting for the prescribed rates, he sought "to relieve the condition of agriculture," cannot in the face of the report be interpreted as intimating that he meant other than legal relief. Nor do we find convincing evidence in the other concurring opinions that the Commission or its individual members did not, as they state in the report, make their findings in pursuance of and in compliance with the Interstate Commerce law.

It is contended that the finding which the report contains that the present rates are unreasonable to the extent that they exceed those prescribed is not sufficient to support the order. If we were able to determine satisfactorily to ourselves that the Commission deemed the rates unreasonable under the joint resolution, but not under the provisions of the interstate commerce act, as the Supreme Court found the case to be in Ann Arbor R. R. Co. v. U. S. — U. S. —, we would necessarily be impelled to enjoin the order, for as determined by the decision last mentioned, the Commission may not, in determining the reasonableness or unreasonableness of any rate, "entertain considerations not applicable under those sections (1, (5) and 3 (1)) but believed by it to have been brought into the problem by the resolution." But in the absence of the record and an opportunity to examine the evidence before the Commission, we [fol. 841] are without power, in the absence of convincing evidence in the report itself, to say that the order was based upon the application of standards other than those established by the Interstate Commerce Act or upon a misconception of the Commission's powers and duties. Despite the argument of counsel that it is apparent from the face of the report that the Commission followed instruction of the resolution instead of that of the law, on examination of the report is not convincing of such conclusion. Nor can we ignore the direct statement of the Commission that "the findings herein are under the provisions of the interstate commerce act." We are controlled in this connection by the amendment to Sec. 14 in 1906 (Hepburn Act) dispensing "with the necessity of formal findings of fact except in cases where reparation or damages are involved." Mfrs. Ry. Co. v. U. S. 246 U. S. 457.

Complaint is made that almost two years intervened between the date of closing evidence and that of entry of the order; that the record had become stale and conditions changed for the worse for the carriers and that it was, therefore, error of law for the Commission to deny petitions for rehearing setting up said changed conditions. Orders prescribing rates do not constitute rei adjudicata. The Commission's administrative duty under the law in establishing reasonable rates and effecting desistance from unreasonable rates and practices is a never ending one, and

to that administrative body the carriers may at any time appeal for relief from harsh situations. The accumulation and consideration of 53,000 pages of testimony and the preparation of conclusions thereon is a gigantic task and one requiring much time. Quite naturally, conditions change during any such period. The world and its myriads of affairs are never the same two days in succession; the history of today always differs from that of yesterday. If the Commission has no discretion to deny petitions for rehearing because of changed conditions, it would never arrive at a [fols. 842 & 843] time when it might enter a lawful order. But the Commission has a discretion in the premises and even tho' we might believe it would have been wiser in the present case to have granted a rehearing, we have no right to substitute our judgment in that respect for that of the statutory body. Nor in view of the character of rate orders and the nature of the Commission's duties, do we find any evidence of arbitrary abuse of discretion. The order is not res adjudicata and the carriers have a right to relief whenever they can show that they are being unlawfully damaged. What may be the practical result of the new schedule; what the result of the general investigation of the universal rate schedule may be; whether after completion of the Commission's tremendous task, the return to which the carriers are presumptively entitled may be realized or not are questions for the future. If the answers are not satisfactory, the interested parties may appeal to the Commission and to the courts.

From what we have said and the findings of fact adopted it follows that we do not deem the showing sufficient to warrant the allowance of the motion. Intervening petitions were filed herein, and certain other causes have been consolidated herewith, but nothing suggested as to the questions involved therein is sufficient to warrant interference with the Commission's order by us.

The motion for a temporary injunction will be denied and the temporary restraining order heretofore entered dissolved.

Endorsed: Filed July 6, 1931. Charles M. Bates, Clerk.

[fols. 844 & 845] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity. No. 10479

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al., Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

ORDER DENYING INTERLOCUTORY INJUNCTION AND DISSOLVING TEMPORARY RESTRAINING ORDER—July 7, 1931

This cause came on to be heard upon the application of petitioners for an interlocutory injunction and was argued by counsel for the respective parties, and the court being fully advised in the premises, and having made and filed its findings of fact and conclusions of law,

It is this 7th day of July, 1931, Ordered, Adjudged and Decreed that the said application for a temporary injunction be, and the same is hereby, denied.

It is further Ordered, Adjudged and Decreed that the order of this court, dated May 7, 1931, staying and suspending for a period of sixty days, the orders of the Interstate Commerce Commission of July 1, 1930, and of April 10, 1931, described therein, be, and the same is hereby, vacated and dissolved.

William M. Sparks, Circuit Judge. Walter C. Lindley, District Judge. Charles E. Woodward, District Judge.

[fols. 846 & 847] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity. No. 10482

THE TERMINAL GRAIN CO. et al., Petitioners,

v.

UNITED STATES, INTERSTATE COMMERCE COMMISSION, et al., Defendants

ORDER DENYING INTERLOCUTORY INJUNCTION AND DISSOLVING TEMPORARY RESTRAINING ORDER—July 7, 1931

This cause came on to be heard upon the application of petitioners for a temporary injunction and was argued by

counsel for the respective parties, and the court being fully advised in the premises, and having made and filed its findings of fact and conclusions of law,

It is this 7th day of July, 1931, Ordered, Adjudged and Decreed that the said application for a temporary injunction be, and the same is hereby, denied.

It is further Ordered, Adjudged and Decreed that the order of this Court, dated May 7, 1931, staying and suspending for a period of sixty days, the orders of the Interstate Commerce Commission of July 1, 1930, and of April 10, 1931, described therein, be, and the same is hereby, vacated and dissolved.

William M. Sparks, Circuit Judge. Walter C. Lindley, District Judge. Charles E. Woodward, District Judge.

[fols. 848 & 849] IN UNITED STATES DISTRICT COURT

In Equity. Consolidated Cause No. 10479

[fol. 850] In Equity. No. 10482

[Titles omitted]

Before the Honorable William M. Sparks, United States Circuit Judge, and the Honorable Walter C. Lindley and the Honorable Charles E. Woodward, United States District Judges, Constituting the United States District Court in the Above-entitled Consolidated Causes

PETITION FOR APPEAL—Filed July 10, 1931

To the Honorable the Judges above named:

The above-named petitioners and intervening petitioners considering themselves aggrieved by the orders made and entered in the above-entitled consolidated causes on the 7th day of July, 1931, denying their applications for an interlocutory injunction, do hereby appeal therefrom to the Supreme Court of the United States for the reasons set [fol. 851] forth in the assignment of errors filed herewith and pray that said appeal be allowed; that a proper order be made relating to the appeal bond to be given by peti-

tioners; that a citation issue as provided by law; and that a transcript of the record, proceedings and papers upon which said orders were based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Dated July 10, 1931.

Frederick H. Wood, Walter McFarland, Elmer A. Smith, P. F. Gault, Douglas F. Smith, H. H. Larimore, J. N. Davis, A. B. Mason, R. J. Hagman, M. L. Countryman, Jr., R. S. Outlaw, Leslie Craven, Wm. D. Whitney, A. B. Enoch, D. P. Connell, Solicitors for Petitioners and Intervening Petitioners in No. 10479, Room 1025 La Salle Street Station, Chicago, Illinois. Dick Dixon, Frank A. [fols. 852 & 853] Leffingwell, Solicitors for Petitioners in No. 10482, Room 1901, Santa Fe Building, Dallas, Texas.

[fols. 854 & 855] IN UNITED STATES DISTRICT COURT

In Equity. Consolidated Cause No. 10479

[fol. 856] In Equity. No. 10482

[Titles omitted]

ASSIGNMENTS OF ERROR—Filed July 10, 1931

Now Come the above-named petitioners and intervening petitioners, and, in connection with their petition for appeal, file the following assignments of error on which they will rely on their appeal to the Supreme Court of the United States from the orders of the District Court, entered July 7, 1931, in the above-entitled consolidated causes, denying the petitioners' and intervening petitioners' applications for an interlocutory injunction restraining the enforcement of the order of the Interstate Commerce Commission entered July 1, 1930, as modified by supplemental order entered April 10, 1931.

I. The Court erred in holding in its conclusion of law No. II that the order complained of was and is consistent [fol. 857] with and supported and justified by the findings

contained in the Commission's report and in not holding and concluding to the contrary.

II. The Court erred in holding in its conclusion of law No. III that the findings of fact made by the Commission were conclusive upon the Court since no claim was made that these findings were unsupported by the evidence, and especially since the record upon which the Commission made its findings was not introduced in evidence and in not holding and concluding that the said findings were not conclusive upon the Court because based upon a misconstruction and misinterpretation of the Interstate Commerce Act, upon a misconception of its powers and duties thereunder, and upon a consideration of matters outside the record.

III. The Court erred in finding in its conclusion of law No. IV that the Commission did not misconstrue, misinterpret or misapply the law applicable to the subject matter involved in the proceeding before it, particularly that it did not misconstrue, misapply or misinterpret the so-called Hoch-Smith Resolution, and that the Commission gave proper consideration to and made proper interpretation of all the applicable law, including Sec. 15a (2) and (3) of the Interstate Commerce Act, and in not holding and finding to the contrary.

IV. The Court erred in its conclusion of law No. V in finding that there was no error of law or any irregularities in the proceedings before the Commission or in the making of the findings and orders complained of; that the Com- [fol. 858] mission did not exceed its power and authority therein; did not act arbitrarily or in disregard of any legal right of petitioners or others, parties to the pr[redacted]dings, and in not finding and holding to the contrary.

V. The Court erred in its conclusion of law No. VI in finding that there was no abuse of discretion by the Commission in the denial of the several motions for rehearing, reargument and/or modification of the Commission's findings and orders, and in not finding and holding to the contrary.

VI. The Court erred in its conclusion of law No. VII in finding that the orders of the Commission were and are a valid exercise of its power and authority and should be confirmed, and in not finding and holding to the contrary.

VII. The Court erred in its conclusion of law No. VIII in finding that the temporary restraining order should be dissolved and that the application for interlocutory injunction should be denied, and in not finding that said application should be granted.

VIII. The Court erred in holding that in determining the validity of the order of the Commission, the concurring opinions of certain members thereof as well as the main report of the Commission should not be considered.

IX. The Court erred in not finding that in prescribing the lowest possible lawful rates on grain and grain products as maximum reasonable rates, the order of the Commision will prevent the carriers pro tanto from earning as nearly as may be the rate of return required by Sec. 15a of the Interstate Commerce Act.

X. The Court erred in not holding that the Commission [fol. 859] misconstrued and misinterpreted Sec. 15a of the Interstate Commerce Act and proceeded on an erroneous conception of its powers and duties thereunder.

XI. The Court erred in not holding that in considering the effect of the proposed reductions on the maintenance of an adequate system of transportation and in making its finding of fact in respect thereof, the Commission erroneously relied on and considered matters not of record in the proceedings before it.

XII. The Court erred in not holding that by employing the lowest possible lawful rates as a standard for the measurement of either the existing rate or for the determination of reasonable maximum rates under Sections 1 and 15 of the Interstate Commerce Act the Commission exceeded the powers conferred upon it by the Interstate Commerce Act.

XIII. The Court erred in not holding that in prescribing the lowest possible lawful rates as the maximum reasonable rates under Sections 1 and 15 of the Interstate Commerce Act the Commission established grain and grain products as a favored class, applied thereto standards of reasonableness other than and different from these provided by the Interstate Commerce Act for the determination of reasonableness of rates on other commodities and relieved the same from making their proper contribution to the requirements

of Sec. 15a of the Interstate Commerce Act, contrary to the powers and duties imposed upon the Commission by the Interstate Commerce Act.

XIV. The Court erred in not holding that the order of the Commission was based upon an erroneous interpreta-
[fol. 860] tion of the effect of the Hoch-Smith Resolution upon its powers and duties.

XV. The Court erred in not holding that the order of the Commission was based upon an erroneous interpretation of its powers and duties under the Interstate Commerce Act.

XVI. The Court erred in not holding that the action of the Commission in denying the carriers' petitions for rehearing and by so doing in requiring the rates prescribed in its order to become effective in the future without any rehearing because of changed conditions set forth therein, was taken in disregard of and in violation of the duties imposed upon it by the Interstate Commerce Act, was arbitrary and unreasonable, constituted an abuse of its administrative discretion and was in excess of the authority conferred upon it by law, denied to the carriers an opportunity to be heard, and constituted a denial of due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

XVII. The Court erred in not holding that the order of the Commission upon its face and upon the facts appearing from the petition, exhibits thereto, the answers and affidavits submitted upon the application for temporary injunction, is void.

XVIII. The Court erred in not finding that the effect of the order of the Commission is to reduce the revenues of the carriers by approximately $20,000,000 per annum, and in not finding that unless the said order was stayed or suspended through the granting of interlocutory injunction, [fol. 861] the petitioners would suffer irreparable injury.

XIX. The Court erred in not holding that there was a reasonable possibility that the petitioners would succeed on final hearing.

XX. The Court erred in not finding that in so far as the order of the Commission required the carriers to remove

certain inequalities found by the Commission to exist in the relationship of certain rates on grain and grain products, as compared with other rates thereon, and required the carriers to modify certain inequalities and practices relating to grain and grain products referred to in the findings of fact, it was not necessary in order to correct said inequalities and practices to reduce the general level of the rates on grain and grain products or the revenue of the carriers therefrom, and that said reductions were not incidental thereto.

XXI. The Court erred in holding that the Commission was not required in the making of its order to give effect to the requirements of Sec. 15a of the Interstate Commerce Act.

XXII. The Court erred in holding in effect that the following statement of the Commission, to wit:

"• • • The Supreme Court of the United States recently interpreted the Hoch-Smith resolution as setting up no standard of reasonableness of rate level or relation other than that already provided by the interstate commerce act. Ann Arbor Railroad Company v. United States, (281 U. S. 658), decided June 2, 1930. The findings herein are under the provisions of the interstate commerce act."

was binding upon the Court in respect of the nature of the action taken by the Commission and the legal basis therefor, and that by reason thereof any error which the Com-
[fol. 862] mission committed was one of fact and not of law.

XXIII. The Court erred in not finding that the order was not supported by the recitals or findings of fact contained in the report of the Commission.

XXIV. The Court erred in holding that it was bound to assume that the evidence before the Commission as a whole was sufficient to sustain the ultimate finding made by the Commission that the existing rates were unreasonable, notwithstanding that the report of the Commission when read as a whole showed that that ultimate finding was based upon an error of law.

XXV. The Court erred in not holding that the Commission was in error in construing Section 15a as a mere permis-

sion to the carriers to earn a fair return upon the value of their property.

XXVI. The Court erred in not holding that the Commission was in error in substituting for the positive standard of Section 15a (that the carriers should earn a fair return upon the value of their property) a vague and indefinite standard of the Commission's (that the carriers' rates should not be so low as in the opinion of the Commission to threaten the maintenance of an adequate system of transportation).

XXVII. The Court erred in not holding that there were absent from the Commission's report any basic or evidential findings sufficient to support the order or any findings or recitals of fact commonly to be found in the reports of the Commission when proceeding solely under the standards of the Interstate Commerce Act and that there were absent any findings of changed conditions or addi-[fol. 863] tional facts since the previous decision of the Commission in Rates and Charges on Grain and Grain Products, decided July 10, 1924, in which the Commission approved the general level of existing rates as reasonable and lawful under the Interstate Commerce Act.

XXVIII. The Court erred in not holding that the order of the Commission was based upon a misconception of its powers substantially similar to that condemned by the Supreme Court in Ann Arbor R. R. Co. v. United States, 281 U. S. 658.

XXIX. The Court erred in not holding that the Commission so abused its discretion in denying the carriers' several petitions for rehearing as to bring its action within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of its power.

XXX. The Court erred in not finding the facts as submitted in petitioners' proposed findings of fact, in that such facts were undisputed upon the face of the evidence before the Court.

XXXI. The Court erred in not holding that the Commission was in error in requiring the Great Northern Railroad Company, the Northern Pacific Railway Company, the Chicago, Milwaukee, St. Paul and Pacific Railway Company

and Oregon-Washington Railroad & Navigation Company to cease and desist from making a separate charge for transit on certain of their lines.

Wherefore the petitioners and intervening petitioners, appellants, pray that the decision of the District Court and the orders entered thereon be reversed, and that said District Court of the United States for the Northern District of Illinois, Eastern Division, be directed to enter an order vacating and setting aside its said orders in said consolidated causes and be directed to enter an order granting an interlocutory injunction staying, suspending and enjoining the enforcement of said order of the Interstate Commerce [fols. 864 & 865] Commission pendente lite and declaring same to be void.

Dated July 10, 1931.

Frederick H. Wood, Walter McFarland, Elmer A. Smith, P. F. Gault, Douglas F. Smith, H. H. Larimore, J. N. Davis, A. B. Mason, R. J. Hagman, M. L. Countryman, Jr., R. S. Outlaw, Leslie Craven, Wm. D. Whitney, A. B. Enoch, D. P. Connell, Solicitors for Petitioners and Intervening Petitioners in Equity, Docket No. 10479, Room 1025, La Salle Street Station, Chicago, Illinois. Dick Dixon, Frank A. Leffingwell, Solicitors for Petitioners in Equity, Docket No. 10482, Room 1901, Santa Fe Building, Dallas, Texas.

[fols. 866-870] Bond on appeal for $5,000, approved and filed July 10, 1931, omitted in printing.

[fol. 871] And on, to-wit, the 10th day of July, 1931, being one of the days of the regular July Term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Judges, William M. Sparks, Walter C. Lindley and Charles E. Woodward, the following order, allowing Appeal was entered:

[fol. 872] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity. Consolidated Cause No. 10479

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al., Petitioners,

against

UNITED STATES OF AMERICA et al., Defendants

In Equity. No. 10479

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, The Beaumont, Sour Lake & Western Railway Company, Bingham and Garfield Railway Company, The Chicago and Alton Railroad Company, and William W. Wheelock and William G. Bierd, Receivers; Chicago and North Western Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago Great Western Railroad Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, The Chicago, Rock Island and Gulf Railway Company, The Chicago, Rock Island and Pacific Railway Company, Chicago, Saint Paul, Minneapolis and Omaha Railway Company, The Colorado and Southern Railway Company, The Denver and Rio Grande Western Railroad Company, The Denver and Salt Lake Railway Company, The Duluth, South Shore and Atlantic Railway Company, Duluth, Winnipeg and Pacific Railway, Fort Smith and Western Railway Company, Fort Worth and Denver City Railway Company, Fort Worth and Rio Grande Railway Company, Great Northern Railway Company, Gulf, Colorado & Santa Fe Railway Company, Green Bay & Western Railroad Company, Illinois Central Railroad Company, International-Great Northern Railroad Company, The Kansas City Southern Railway Company, Kansas, Oklahoma & Gulf Railway Company, Lake Superior & Ishpeming Railroad Company, Los Angeles & Salt Lake Railroad Company, Louisiana & Arkansas Railway Company, Louisiana, Arkansas & Texas Railway Company, Midland Valley Railroad Company, The Minneapolis and St. Louis Railroad Company, and W. H. Bremner, Receiver; Minneapolis, St. Paul & Sault Ste. Marie Railway

Company, Missouri and North Arkansas Railway Company, Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas, Missouri Pacific Railroad Company, Nevada Northern Rail-
[fol. 873] way Company, New Orleans, Texas & Mexico Railway Company, Northern Pacific Railway Company, Northwestern Pacific Railroad Company, Oklahoma City-Ada-Atoka Railway Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad & Navigation Company, Panhandle and Santa Fe Railway Company, Quincy, Omaha & Kansas City Railroad Company, San Antonio, Uvalde & Gulf Railroad Company, The St. Joseph and Grand Island Railway Company, The St. Louis, Brownsville and Mexico Railway Company, St. Louis-San Francisco Railway Company, St. Louis, San Francisco & Texas Railway Company, St. Louis Southwestern Railway Company, St. Louis Southwestern Railway Company of Texas, San Diego and Arizona Railway Company, Southern Pacific Company, Spokane International Railway Company, Spokane, Portland and Seattle Railway Company, Texarkana and Fort Smith Railway Company, Texas and New Orleans Railroad Company, The Texas and Pacific Railway Company, The Texas Mexican Railway Company, Toledo, Peoria & Western Railroad, The Burlington-Rock Island Railroad Company (heretofore named The Trinity and Brazos Valley Railway Company), Union Pacific Railroad Company, Utah Railway Company, Wabash Railway Company, The Western Pacific Railroad Company, Wichita Falls & Southern Railroad Company, The Wichita Valley Railway Company, The Yazoo & Mississippi Valley Railroad Company, Petitioners; The Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, Boston and Maine Railroad, The Delaware and Hudson Railroad, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, Grand Trunk Western Railroad Company, Lehigh Valley Railroad, The New York Central Railroad Company for Itself and as Lessee of Boston & Albany Railroad; Cleveland, Cincinnati, Chicago & St. Louis Railway and Michigan Central Railroad, The New York, Chicago and St. Louis Railroad Company, The New York, New Haven and Hartford Railroad Company, The Pennsylvania

Railroad Company, and Pere Marquette Railway Company, Intervening Petitioners,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants; Corporation Commission of Arizona, Public Utilities Commission of the State of Colorado, Public Utilities Commission of the State of Idaho, Public Service Commission of Missouri, Board of Railroad Commissioners of the State of Montana, Public [fol. 874] Service Commission of Nevada, New Mexico State Corporation Commission, Board of Railroad Commissioners of North Dakota, Corporation Commission of Oklahoma, Public Utility Commissioner of Oregon, Board of Railroad Commissioners of the State of South Dakota, Arkansas Railroad Commission, Public Service Commission of Wyoming, Nebraska State Railway Commission, State of North Dakota, Doing Business as the North Dakota Mill & Elevator Association, and the North Dakota Terminal Exchange, Board of Trade of Kansas City, Missouri, and Public Service Commission for the State of Kansas, J. W. Greenleaf, Charles D. Shukers, and Thurman Hill, Members, Intervening Defendants

In Equity. No. 10482

TERMINAL GRAIN COMPANY, MORTEN MILLING COMPANY, Stanard-Tilton Milling Company, Universal Mills, Petitioners,

against

THE UNITED STATES OF AMERICA, Defendant

ORDER ALLOWING APPEAL—July 10, 1931

On this day came the petitioners and intervening petitioners above-named by Messrs. Frederick H. Wood, Walter McFarland, Elmer A. Smith, P. F. Gault, Douglas F. Smith, H. H. Larimore, J. N. Davis, A. B. Mason, R. J. Hagman, M. L. Countryman, Jr., R. S. Outlaw, Leslie Craven, Wm. D. Whitney, A. B. Enoch, D. P. Connell, Dick Dixon and Frank A. Leffingwell, their solicitors, and presented their petition for appeal and their assignments of

error which have been duly filed and upon consideration thereof it is

Ordered and adjudged that an appeal to the Supreme Court of the United States from the orders heretofore entered in the above-entitled consolidated causes on the 7th [fols. 875 & 876] day of July, 1931, denying said petitioners' applications for an interlocutory injunction herein be, and the same hereby is, allowed to said petitioners and intervening petitioners; that the bond on said appeal be fixed at the sum of Five thousand Dollars ($5,000.00) the same to be and act as a bond for costs but not as a supersedeas; that a certified transcript of the record upon which said orders were based including the proposed or requested findings of fact and conclusions of law submitted by the parties as well as the findings of fact and conclusions of law found by this Court herein upon said applications and its opinion thereon filed herein be transmitted in due course to the Supreme Court of the United States, and it is

Further ordered that the appeal bond in the sum of Five thousand Dollars ($5,000.00) wherein The Chicago, Rock Island and Pacific Railway Company, one of said petitioners is principal and the National Surety Company of New York is surety, conditioned for payment of costs upon said appeal and presented for approval be and it hereby is approved and ordered filed.

Dated July 10, 1931.

William M. Sparks, United States Circuit Judge;
Walter C. Lindley, United States District Judge;
Charles E. Woodward, United States District Judge, Constituting the United States District Court in the Above-entitled Consolidated Causes.

[fols. 877 & 878] In United States District Court

In Equity. Consolidated Cause No. 10479

[fol. 879] In Equity. No. 10482

[Titles omitted]

Order Enlarging Time Within Which to Docket Cause and File the Transcript of Record—July 10, 1931

On this day came on for hearing the application or petition filed by the Petitioners in the consolidated causes

above named, for an order extending the time within which to file the record on appeal and to docket the case, and it appearing that because of the time required to be consumed in the service of the præcipe upon the parties defendant (appellees), who are widely separated, and in the filing thereof, together with proof of acknowledgment of service upon each of said defendants, together with the time thereafter allowed by the rules for the service of counter-[fols. 880 & 881] præcipes, petitioners will be unable by the return day of said citation to complete the work of assembling and preparing and causing to be certified and filed, petitioners' præcipe and the transcript of record herein on appeal, and for other good cause shown to the Court, it is

Ordered that the time within which the Petitioners and Intervening Petitioners above named (Appellants) shall complete and serve and file (in this Court) their præcipe, and cause the transcript of record to be completed, and *docket the case* and have the transcript of record filed with the Clerk of the Supreme Court of the United States, be, and it hereby is, enlarged to and including September 8, 1931.

Dated July 10, 1931.

William M. Sparks, United States Circuit Judge;
Walter C. Lindley, United States District Judge;
Charles E. Woodward, United States District Judge, Constituting the United States District Court in the Above-entitled Consolidated Causes.

[fols. 882 & 883] IN UNITED STATES DISTRICT COURT

In Equity. Consolidated Cause No. 10479

[fol. 884] In Equity. No. 10482

[Titles omitted]

PETITION FOR ORDER EXTENDING TIME TO FILE RECORD ON APPEAL—Filed July 10, 1931

Now come the Petitioners and Intervening Petitioners above-named, by their solicitors of record, and respectfully show:

That on, to-wit, July 7, 1931, an order was made by your Honors in the above-entitled consolidated causes adverse to your Petitioners; that your Petitioners have been allowed by your Honors to appeal to the Supreme Court of the United States from said order, and that citation returnable thirty days from July 10, 1931 has been issued [fol. 885] by your Honors to the defendants; that because the record is voluminous and because the parties defendant, and their solicitors of record, are widely separated with the result that much time will be consumed in securing service upon them and in filing proof of such service in connection with said appeal, your Petitioners (Appellants) state that they will be unable by the return day of said citation to complete the work of assembling and preparing and causing to be certified and filed, the Petitioners' præcipe and the transcript of record herein on appeal.

Wherefore Petitioners pray that they be granted an extension or enlargement of the time within which to file in the Supreme Court of the United States the record upon the appeal of the above-entitled consolidated causes, and that they be allowed until and including September 8, 1931 in which to complete and serve and to file (in this Court) their præcipe, and in which to cause the transcript of record to be completed, and in which to docket the case and have the transcript of record filed with the Clerk of the Supreme Court of the United States.

Dated, July 10, 1931.

Frederick H. Wood, Walter McFarland, Elmer A. Smith, P. F. Gault, Douglas F. Smith, H. H. Larimore, J. N. Davis, A. B. Mason, R. J. Hagman, [fols. 886 & 887] M. L. Countryman, Jr., R. S. Outlaw, Leslie Craven, Wm. D. Whitney, A. B. Enoch, D. P. Connell, Solicitors for Petitioners and Intervening Petitioners in Equity, Docket No. 10479, Room 1025 La Salle Street Station, Chicago, Illinois. Dick Dixon, Frank A. Leffingwell, Solicitors for Petitioners in Equity, Docket No. 10482, Room 1901 Santa Fe Building, Dallas, Texas.

[fols. 888 & 889] IN UNITED STATES DISTRICT COURT

In Equity. Consolidated Cause No. 10479

[fol. 890] In Equity. No. 10482

[Titles omitted]

NOTICE OF APPEAL TO THE ATTORNEY GENERAL OF THE STATE OF ILLINOIS—Filed July 15, 1931

To Honorable Attorney General of the State of Illinois, Springfield, Illinois:

You are hereby notified that the United States District Court for the Eastern Division of the Northern District of Illinois has filed and entered an order allowing an appeal to the Supreme Court of the United States from orders signed, filed and entered on the 7th day of July, 1931, in the above-entitled consolidated causes, and that the order allowing the appeal makes the same returnable within thirty days from the date thereof.

This notice is given to you pursuant to the Urgent De-
[fol. 891] ficiency Appropriations Act (38 Stat. L. 219, 221).

Dated July —, 1931.

Frederick H. Wood, Walter McFarland, Elmer A. Smith, P. F. Gault, Douglas F. Smith, H. H. Larimore, J. N. Davis, A. B. Mason, R. J. Hagman, M. L. Countryman, Jr., R. S. Outlaw, Leslie Craven, Wm. D. Whitney, A. B. Enoch, D. P. Connell, Solicitors for Petitioners and Intervening Petitioners in No. 10479, Room 1025, La Salle Street Station, Chicago, Illinois. Dick Dixon, Frank A. Leffingwell, Solicitors for Petitioners in No. 10482, Room 1901, Santa Fe Building, Dallas, Texas.

[fols. 892 & 893] Receipt of the foregoing Notice is hereby acknowledged this 13th day of July, 1931.

The Attorney General of the State of Illinois, by W. E. Trautmann, First Asst. Atty. General.

[fols. 894 & 895] IN UNITED STATES DISTRICT COURT

In Equity. Consolidated Cause No. 10479

[fol. 896] In Equity. No. 10482

[Titles omitted]

PETITIONERS' (APPELLANTS') PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 25, 1931

To the Clerk of the above court:

You are hereby requested to prepare a transcript of the record in the above-entitled consolidated causes to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above-entitled consolidated causes, and to include in such transcript of record the following, and no other papers and exhibits, to-wit:

1. The petition and exhibits thereto in Equity Docket No. 10479.

2. The order of the Honorable Charles E. Woodward, District Judge, dated April 29, 1931, organizing the Court.

[fol. 897] 3. The acknowledgment of service of the petition and exhibits on defendants, United States and Interstate Commerce Commission in No. 10479.

4. Notice to defendants of application for interlocutory injunction in No. 10479 and of date of hearing thereon and acknowledgments of service thereof.

5. The order of the Honorable Charles E. Woodward, District Judge, dated May 4, 1931, reconstituting the court.

6. Petition for leave to intervene in No. 10479 of The Baltimore and Ohio Railroad Company, et al.

7. Order, dated May 7, 1931, permitting The Baltimore and Ohio Railroad Company, et al., to intervene in No. 10479.

8. Petition for leave to intervene in No. 10479 of Corporation Commission of Arizona, et al., and order dated May 7, 1931.

9. Petition for leave to intervene in No. 10479 of Nebraska State Railway Commission, and order dated May 7, 1931.

10. Petition for leave to intervene in No. 10479 of State of North Dakota, doing businese as The North Dakota Mill

and Elevator Assoc., and The North Dakota Terminal Exchange, and order dated May 7, 1931.

11. Order dated May 7, 1931, allowing Board of Trade of Kansas City, et al., to intervene in No. 10479.

12. The separate answer of the defendant United States of America in No. 10479.

13. The separate answer of the defendant Interstate Commerce Commission in No. 10479.

14. The separate answer of intervening defendants, Corporation Commission of Arizona, et al., in No. 10479.

[fol. 898] 15. The separate answer of intervening defendant, the Public Service Commission for the State of Kansas, J. W. Greenleaf, Charles D. Shukers and Thurman Hill, Members, in No. 10479.

16. The separate answer of intervening defendant, Nebraska State Railway Commission, in No. 10479.

17. The petition and exhibits thereto in Equity Docket No. 10482 (omitting Appendix A, being the same as Exhibits E and F annexed to the Petition in No. 10479).

18. Motion for order to consolidate Equity Docket No. 10482 with Equity Docket No. 10479, and order consolidating the same, dated May 7, 1931.

19. The answer of the defendant United States of America, in No. 10482.

20. The separate answer of the defendant, Interstate Commerce Commission, in No. 10482.

21. The affidavit of L. E. Wettling, dated May 6, 1931.

22. The affidavit of Gentry Waldo, dated May 6, 1931.

23. The affidavit of E. V. Peterson, dated May 4, 1931,

24. The affidavit of Paul Peters, dated May 4, 1931.

25. The affidavit of B. F. E. Marsh, dated May 6, 1931.

26. The affidavit of Patrick J. McCarthy, dated May 5, 1931.

27. The affidavit of A. B. Enoch, dated May 6, 1931.

[fol. 899] 28. The affidavit of R. B. Outlaw, dated May 7, 1931.

29. The affidavit of C. B. Bee, dated May 6, 1931.

30. The affidavit of W. W. Manning, dated April 8, 1931, filed in No. 10482.

31. Order for temporary restraining order, dated May 7, 1931, with acknowledgments of service thereon on counsel for the defendants.

32. Findings of Fact and Conclusions of Law requested by Petitioners.

33. Findings of Fact and Conclusions of Law requested by defendant, Interstate Commerce Commission.

34. Findings of Fact and Conclusions of Law requested by The Public Service Commission for the State of Kansas.

35. The Findings of Fact and Conclusions of Law of the District Court.

36. The opinion of the Judges constituting the District Court.

37. The order of the District Court denying application for interlocutory injunction in No. 10479.

38. The order of the District Court denying application for interlocutory injunction in No. 10482.

39. Petitioners' petition for appeal.

40. Petitioners' assignments of error.

41. Petitioners' appeal bond.

42. Order allowing appeal.

43. Citation issued at instance of petitioners with acknowledgments of service thereon on the defendants and intervening defendants.

[fol. 900] 44. Petition for enlarging time to file record on appeal.

45. Order enlarging time to file record on appeal.

46. Notice of appeal to Attorney General of the State of Illinois.

47. Præcipe for record with acknowledgments of service thereof on counsel for the defendants and intervening defendants.

Said transcript is to be prepared as required by law and the rules of this Court and by the rules of the Supreme Court of the United States.

Dated July 10, 1931.

Frederick H. Wood, Walter McFarland, Elmer A. Smith, P. F. Gault, Douglas F. Smith, H. H. Larimore, J. N. Davis, A. B. Mason, R. J. Hagman, M. L. Countryman, Jr., R. S. Outlaw, Leslie Craven, Wm. D. Whitney, A. B. Enoch, D. P. Connell, Solicitors for Petitioners and Intervening Petitioners in Equity, Docket No. 10479, Room 1025, La Salle Street Station, Chicago, Illinois. Dick Dixon, Frank A. Leffingwell, Solicitors for Petitioners in Equity, Docket No. 10482, Room 1901, Santa Fe Building, Dallas, Texas.

[fol. 901] Service of the foregoing Præcipe for Transcript of Record, and the receipt of a copy thereof, are hereby accepted and acknowledged this 21st day of July, 1931.

Elmer B. Collins, for the United States of America.

[fol. 902] Service of the foregoing Præcipe for Transcript of Record, and the receipt of a copy thereof, are hereby accepted and acknowledged this 21st day of July, 1931.

E. M. Reidy, for the Interstate Commerce Commission.

[fol. 903] Service of the foregoing Præcipe for Transcript of Record, and the receipt of a copy thereof, are hereby accepted and acknowledged this 21st day of July, 1931.

John E. Benton, by R. E. May, for the Corporation Commission of Arizona, Public Utilities Commission of the State of Colorado, Public Utilities Commission of the State of Idaho, Public Service Commission of Missouri, Board of Railroad Commissioners of the State of Montana, Public Service Commission of Nevada, New Mexico State Corporation Commission, Board of Railroad Commissioners of North Dakota, Corporation Commission of Oklahoma, Public Utility Commissioner of Oregon, Board of Railroad Commissioners of the State of South Dakota, Arkansas Railroad Commission and Public Service Commission of Wyoming.

[fol. 904] Service of the foregoing Præcipe for Transcript of Record, and the receipt of a copy thereof, are hereby accepted and acknowledged this 14th day of July, 1931.

Harrison A. Bronson, for the State of North Dakota, Doing Business as the North Dakota Mill & Elevator Association, and the North Dakota Terminal Exchange.

[fol. 905] Service of the foregoing Præcipe for Transcript of Record, and the receipt of a copy thereof, are hereby accepted and acknowledged this 17th day of July, 1931.

C. A. Sorensen, Attorney General of Nebraska; Hugh LaMaster, Asst. Atty. Gen., Attys. for the Nebraska State Railway Commission.

[fol. 906] Service of the foregoing Præcipe for Transcrip of Record, and the receipt of a copy thereof, are hereby ac cepted and acknowledged this 13th day of July, 1931.

Ralph Merriam, for the Board of Trade of Kansas City, Missouri.

[fol. 907] Service of the foregoing Præcipe for Transcript of Record, and the receipt of a copy thereof, are hereby accepted and acknowledged this 16 day of July, 1931.

Chas. W. Steiger, for the Public Service Commission of the State of Kansas, J. W. Greenleaf, Charles D. Shukers, and Thurman Hill, Members.

[fols. 908-911] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 912-925] Citation, in usual form, showing service on Elmer B. Collins et al., filed July 25, 1931, omitted in printing.

[fol. 926] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed Aug. 14, 1931

The appellants will, in brief and in oral argument on the hearing of the appeals for a reversal of the orders of the District Court denying a temporary injunction, rely on the following points raised by their assignments of error:

1. The District Court erred in holding that the Commission did not misconstrue, misinterpret or misapply the law applicable to the subject matter involved in the pro-
[fol. 927] ceeding before it, but gave proper consideration to and made proper interpretation of all applicable law, committed no error of law or irregularity in the making of the findings and orders complained of, did not exceed its power and authority or act arbitrarily or in disregard of any legal right of the appellants or others, and that the orders of the Commission were and are a valid

exercise of its power and authority; and in not holding to the contrary; and in not further holding that the order of the Commission is void because based upon an erroneous interpretation of its powers and duties under the Interstate Commerce Act.

2. The District Court erred in not holding that the order of the Commission was void by reason of the fact that by employing the lowest possible lawful rates as a standard for the measurement of either the existing rates or for the determination of reasonable maximum rates under Sections 1 and 15 of the Interstate Commerce Act, the Commission exceeded the powers and duties conferred upon it thereby.

3. The District Court erred in not holding that the order of the Commission was void because based upon a misinterpretation and misconception of Section 15a of the Interstate Commerce Act and of its powers and duties thereunder.

4. The District Court erred in not holding that the order of the Commission was void because in the making thereof the Commission failed to give effect to the provisions of [fol. 928] Section 15a and violated and disregarded its duties thereunder.

5. The District Court erred in not holding that the order of the Commission was void by reason of the fact that in prescribing the lowest possible lawful rates as the maximum reasonable rates under Sections 1 and 15 of the Interstate Commerce Act the Commission established grain and grain products as a favored class, applied thereto standards of reasonableness other than and different from those provided by the Interstate Commerce Act for the determination of reasonable rates on other commodities and relieved the same from making their proper contribution to the requirements of Section 15a of the Interstate Commerce Act, contrary to the powers and duties imposed upon the Commission by the Interstate Commerce Act.

6. The District Court erred in not holding that the order of the Commission was void by reason of the fact that in considering the effect of the proposed reductions on the maintenance of an adequate system of transportation and in making its finding of fact in respect thereof, the Commis-

sion erroneously relied on and considered matters not of record in the proceedings before it.

7. The District Court erred in not holding that the order of the Commission was void because based upon an erroneous interpretation of the Hoch-Smith Resolution and of its effect upon the powers and duties of the Commission under the Interstate Commerce Act.

8. The Court erred in not holding that the action of the Commission in denying the carriers' petitions for rehearing and by so doing in requiring the rates prescribed in its order to become effective in the future without any rehear- [fol. 929] ing because of changed conditions set forth therein, was taken in disregard of and in violation of the duties imposed upon it by the Interstate Commerce Act, was arbitrary and unreasonable, constituted an abuse of its administrative discretion and was in excess of the authority conferred upon it by law, denied to the carriers an opportunity to be heard, and constituted a denial of due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

9. The District Court erred in holding that the order complained of was supported and justified by the findings contained in the Commission's report and in not holding that the findings and recitals therein were insufficient to sustain the order.

10. The Court erred in holding in effect that the following statement of the Commission, to-wit:

"* * * The Supreme Court of the United States recently interpreted the Hoch-Smith resolution as setting up no standard of reasonableness of rate level or relation other than that already provided by the interstate commerce act. Ann Arbor Railroad Company v. United States, (— U. S. —), decided June 2, 1930. The findings herein are under the provisions of the interstate commerce act."

was binding upon the Court in respect of the nature of the action taken by the Commission and the legal basis therefor, and that by reason of the inclusion of said statement in the report, any error which the Commission committed was one of fact and not of law.

11. The District Court erred in holding that the findings of fact made by the Commission were conclusive upon the Court since no claim was made that these findings were unsupported by the evidence, and especially since the record upon which the Commission made its findings was not in- [fol. 930] troduced in evidence, and in not holding and concluding that the said findings were not conclusive upon the Court because based upon a misconstruction and misinterpretation of the Interstate Commerce Act, upon a misconception of its powers and duties thereunder, and upon a consideration of matters outside the record.

12. The District Court erred in not holding that the order of the Commission upon its face and upon the facts appearing from the petition and exhibits thereto, and from the answers and affidavits submitted upon the application for temporary injunction, was void.

13. The District Court erred in not holding that it was not necessary either to reduce the general level of rates on grain and grain products or the revenues of the carriers therefrom, in order to correct such inequalities and discriminations as the Commission found to exist, and that the reductions of such character, which were in fact made by the Commission, were not incidental to such corrections.

14. The District Court erred in not holding that there was reasonable probability that the petitioners would succeed on final hearing.

15. The District Court erred in not finding that unless the order of the Commission was stayed or suspended through the granting of an interlocutory injunction, the petitioners would suffer irreparable injury.

16. The District Court erred in finding that the temporary restraining order should be dissolved and application [fol. 931] for temporary injunction should be denied, and in not finding that said application should be granted.

17. The District Court erred in holding that in determining the validity of the order of the Commission, the concurring opinions of certain members thereof, as well as the report of the Commission as a whole, should not be considered.

18. The District Court erred in not finding the facts as submitted in petitioners' proposed findings of fact, in that such facts were undisputed upon the face of the evidence before the Court.

19. The Court erred in not holding that the Commission was in error in requiring the Great Northern Railroad Company, the Northern Pacific Railway Company, the Chicago, Milwaukee, St. Paul and Pacific Railway Company and Oregon-Washington Railroad & Navigation Company to cease and desist from making a separate charge for transit on certain of their lines.

And the appellants further state that the whole of the record, as filed, is necessary for the consideration of the case.

Frederick H. Wood, Walter McFarland, Elmer A. Smith, P. F. Gault, Douglas F. Smith, H. H. Larimore, J. N. Davis, A. B. Mason, R. J. Hagman, [fol. 932] M. L. Countryman, Jr., R. S. Outlaw, Leslie Craven, Wm. D. Whitney, A. B. Enoch, D. P. Connell, Solicitors for Appellants The Atchison, Topeka and Santa Fe Railway Company et al., Room 1025 La Salle Street Station, Chicago, Illinois. Dick Dixon, Frank A. Leffingwell, Solicitors for Appellants Terminal Grain Company et al., Room 1901 Santa Fe Building, Dallas, Texas.

August 12, 1931.

[fol. 933] Service of the foregoing Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed, and the receipt of a copy thereof, are hereby accepted and acknowledged this 14th day of August, 1931.

Thomas D. Thacher, for the United States of America. P. D. M.

[fol. 934] Service of the foregoing Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed, and the receipt of a copy thereof, are hereby accepted and acknowledged this 14th day of August, 1931.

Daniel W. Knowlton, for the Interstate Commerce Commission.

[fol. 935] Service of the foregoing Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed, and the receipt of a copy thereof, are hereby accepted and acknowledged this 14th day of August, 1931.

John E. Benton, R., for the Corporation Commission of Arizona, Public Utilities Commission for the State of Colorado, Public Utilities Commission for the State of Idaho, Public Service Commissioners of North Dakota, Corporation Commissioners of the State of Montana, Public Service Commission of Nevada, New Mexico State Corporation Commissioners, Board of Railroad Commissioners of North Dakota, Corporation Commission of Oklahoma, Public Utility Commissioner of Oregon, Board of Railroad Commissioners of the State of South Dakota, Arkansas Railroad *Company* Commission, and Public Service Commission of Wyoming.

[fol. 936] UNITED STATES OF AMERICA,
State of New York,
County of New York,
Southern District of New York, ss:

Charles Littleton Groom, being duly sworn, deposes and says that he is associated with Frederick H. Wood, one of the solicitors for the appellants, The Atchison, Topeka & Santa Fe Railway Company, et al., in the above-entitled action; that on the 13th day of August, 1931, he mailed by registered mail, return receipt requested, to

C. A. Sorensen, Esq., Attorney General, Solicitor for Appellees, Nebraska State Railway Commission, Capitol Building, Lincoln, Nebraska;

Harrison A. Bronson, Esq., Solicitor for Appellees, State of North Dakota, doing business as the North Dakota Milling and Elevator Association and the North Dakota Terminal Exchange, Grand Forks, North Dakota;

[fol. 937] Charles W. Steiger, Esq., Solicitor for appellees, The Public Service Commission for the State of Kansas, J. W. Greenleaf, and Thurman Hill, Members, State Capitol Building, Topeka, Kansas; and

Ralph A. Merriam, Esq., Solicitor for appellees, Board of Trade of Kansas City, Missouri, 11 South La Salle Street, Chicago, Illinois,

at said respective addresses a true copy of the foregoing Statement of Points to be Relied Upon and Designation of Parts of the Record to be Printed by depositing said copies, wrapped in securely sealed postpaid wrappers, addressed to said solicitors respectively at the addresses respectively set forth, in the United States Post Office at Pearl and Pine Streets in the Borough of Manhattan, in the City of New York, N. Y.

Charles Littleton Groom.

Subscribed and sworn to before me this 13th day of August, 1931. Preston M. Neilson. Preston M. Neilson, Notary Public, Kings County. Kings Co. Clerk's No. 53, Reg. No. 2061. N. Y. Co. Clerk's No. 314, Reg. No. 2N1A. Bronx Co. Clerk's No. 26, Reg. No. 3264. Queens Co. Clerk's No. 1118, Reg. No. 3954. Certificates also filed in Richmond and Westchester Counties. Commission expires March 30, 1932. (Seal of Preston M. Neilson, Notary Public, Kings County, N. Y.)

[fol. 938] [File endorsement omitted.]

Endorsed on cover: File No. 36,101. N. Illinois D. C. U. S. Term No. 287. The Atchison, Topeka and Santa Fe Railway Company et al., appellants, vs. The United States of America, The Interstate Commerce Commission, et al. Filed August 8, 1931. File No. 36,101.

FILE COPY

OCT 2 193

Supreme Court of the United States

OCTOBER TERM, 1931

No. 287

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,

Appellants,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

TERMINAL GRAIN COMPANY, et al.,

Appellants,

against

UNITED STATES OF AMERICA,

Appellee.

MOTION TO ADVANCE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 287

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,
Appellants,

against

UNITED STATES OF AMERICA *and* INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

TERMINAL GRAIN COMPANY, *et al.*,
Appellants,

against

UNITED STATES OF AMERICA,
Appellee.

MOTION TO ADVANCE

Now come the appellants and the appellees in the above entitled cause and move that said cause be advanced for early hearing, and in support of their motion make the following brief statement of the matters involved and the reasons relied upon for such advancement:

Appellants, The Atchison, Topeka and Santa Fe Railway Company, *et al.*, common carriers engaged in interstate commerce in the Western District (as defined by the appellee, Interstate Commerce Commission, and com-

prising, roughly speaking, the western half of the continental United States) brought suit in the United States District Court for the Northern District of Illinois, Eastern Division, to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission entered on July 1, 1930, as modified by supplemental order entered on April 10, 1931, prescribing rates on grain and grain products in said Western District, made in a proceeding before the Commission entitled "No. 17,000, Rate Structure Investigation, Part VII, Grain and Grain Products within the Western District, and for Export."

The petition alleged that the effect of the said order was materially to reduce the general level of the rates on grain and grain products in said district and to reduce by not less than $20,000,000 annually the revenues of the petitioners; and that the order of the Commission was void because in excess of the powers conferred upon the Commission by the Interstate Commerce Act and based upon a misinterpretation thereof, and for other reasons set forth in the petition.

This is an appeal from orders of the District Court denying an interlocutory injunction after a hearing as provided in U. S. Code, Title 28, Section 47, and is therefore entitled to preference under U. S. Code, Title 28, Section 47a, which provides:

> "Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court."

WHEREFORE, appellants and appellees pray that this cause be advanced upon the calendar and assigned for hearing at an early date.

Respectfully submitted,

FREDERICK H. WOOD,
WALTER MCFARLAND,
ELMER A. SMITH,
P. F. GAULT,
DOUGLAS F. SMITH,
H. H. LARIMORE,
J. N. DAVIS,
A. B. MASON,
R. J. HAGMAN,
M. L. COUNTRYMAN, JR.,
R. S. OUTLAW,
LESLIE CRAVEN,
WM. D. WHITNEY,
A. B. ENOCH,
D. P. CONNELL,
Solicitors for Appellants,
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,
15 Broad Street,
New York, N. Y.

DICK DIXON,
FRANK A. LEFFINGWELL,
Solicitors for Appellants,
TERMINAL GRAIN COMPANY, *et al.*,
Room 1901, Santa Fe Building,
Dallas, Texas.

October 5, 1931.

THOMAS D. THACHER,
Solicitor-General.
JOHN LORD O'BRIAN,
The Assistant to the Attorney-General.
ELMER B. COLLINS,
Special Assistant to the Attorney-General.
DANIEL W. KNOWLTON,
E. M. REIDY,
H. L. UNDERWOOD,
For the INTERSTATE COMMERCE COMMISSION.

D. D. MCDONALD,
FRANCIS SILVER,
JAMES MORRIS,
PAUL A. WALKER,
HERMAN L. BODE,
JOHN E. BENTON,
Solicitors for Appellees,
CORPORATION COMMISSION OF ARIZONA, *et al.*

E. H. HATCHER,
CHARLES W. STEIGER,
Solicitors for Appellee,
THE PUBLIC SERVICE COMMISSION FOR THE STATE OF KANSAS.

RALPH MERRIAM,
Solicitor for Appellee,
BOARD OF TRADE OF KANSAS CITY, MO.

C. A. SORENSEN,
Attorney General,
HUGH LA MASTER,
Assistant Attorney General,
Solicitors for Appellee,
NEBRASKA STATE RAILWAY COMMISSION.

HARRISON A. BRONSON,
Solicitor for Appellee,
STATE OF NORTH DAKOTA, doing Business as the NORTH DAKOTA MILL & ELEVATOR ASSOC., and the NORTH DAKOTA TERMINAL EXCHANGE.

FILE COPY

FILED

SEP 2 1931

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 287, October Term, 1931

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,

Appellants,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

TERMINAL GRAIN COMPANY, *et al.*,

Appellants,

against

THE UNITED STATES OF AMERICA,

Appellee.

STATEMENT AS TO JURISDICTION BY APPELLANTS, UNDER RULE 12

FREDERICK H. WOOD,
WALTER MCFARLAND,
ELMER A. SMITH,
P. F. GAULT,
DOUGLAS F. SMITH,
H. H. LARIMORE,
J. N. DAVIS,
A. B. MASON,
R. J. HAGMAN,
M. L. COUNTRYMAN, JR.,
R. S. OUTLAW,
LESLIE CRAVEN,
WM. D. WHITNEY,
A. B. ENOCH,
D. P. CONNELL,

Solicitor for Appellants,
The Atchison, Topeka and Santa Fe Railway Company, et al.,
15 Broad Street, New York, N. Y.

DICK DIXON,
FRANK A. LEFFINGWELL,

Solicitors for Appellants,
Terminal Grain Company, et al.,
Room 1901, Santa Fe Building,
Dallas, Texas.

August 14, 1931.

Supreme Court of the United States

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,
Appellants,
against
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

TERMINAL GRAIN COMPANY, *et al.*,
Appellants,
against
THE UNITED STATES OF AMERICA,
Appellee.

No. 287
October Term, 1931

STATEMENT AS TO JURISDICTION BY APPELLANTS, UNDER RULE 12

In support of the jurisdiction of this Court to review the above entitled cause on appeal, appellants respectfully submit the following statement:

A. Statutory Provisions.

U. S. C. Title 28, Section 345 [Section 238 of the Judicial Code as amended by Act of February 13, 1925; c. 229, 43 Stat. 936, 938, paragraph (4)].

U. S. C. Title 28, Sections 41 (28), and 47 (Urgent Deficiencies Act of October 22, 1913; c. 32, 38, Stat. 219, 220).

B. Date of Orders Sought to be Reviewed, and Date of Application for Appeal.

The orders sought to be reviewed herein were entered on July 7, 1931 (R. 843, 845).*

The petition for appeal was presented on July 10, 1931, together with an assignment of errors (R. 847-864), and the order allowing the appeal was entered on the same day (R. 871-875).

Citation was issued on July 10, 1931, and was filed, with acknowledgment of service, on July 25, 1931 (R. 924). An order was entered extending to September 8, 1931, the time within which to docket the case and file the transcript of record on this Court (R. 876-880).

The case was docketed in this Court on August 8, 1931.

C. Nature of Case and Rulings Below.

Appellants, the Atchison, Topeka and Santa Fe Railway Company, *et al.*, common carriers engaged in interstate commerce in the Western District (as defined by

*References are made to the pages in the certified unprinted record, because the record has not been printed as yet.

the appellee, Interstate Commerce Commission, in its order of July 1, 1930, hereinafter referred to) brought suit in the United States District Court for the Northern District of Illinois, Eastern Division, to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission entered on July 1, 1930, as modified by a supplemental order entered on April 10, 1931, prescribing rates on grain and grain products in said Western District, made in a proceeding before the Commission entitled No. 17,000 "Rate Structure Investigation, Part VII, Grain and Grain Products within the Western District, and for Export".

This petition alleged that the effect of the said order was materially to reduce the general level of the rates on grain and grain products in said district and to reduce by not less than $20,000,000 annually the revenues of the petitioners; and that the order of the Commission was void because in excess of the powers conferred upon the Commission by the Interstate Commerce Act and based upon a misinterpretation thereof, and for other reasons set forth in the petition.

Appellants, Terminal Grain Company, *et al.*, brought a similar suit in said District Court wherein it was alleged that the said order was void and that the petitioners would be adversely affected thereby.

Notice of application for a temporary injunction to be heard on the 6th day of May, 1931, was served by the petitioners, The Atchison, Topeka and Santa Fe Railway Company, *et al.* upon the defendants on the 30th day of April, 1931 (R. 561-562). Said applications were heard before a court of three judges organized pur-

suant to the statutory provisions above cited (R. 557-558, 563-564). The District Court by order consolidated the suit of *Terminal Grain Company, et al.* v. *The United States of America,* with the suit of *The Atchison, Topeka and Santa Fe Railway Company, et al.* v. *United States of America and Interstate Commerce Commission.* Thereafter, on the 7th day of July, 1931 (R. 843, 845), the District Court entered orders denying the applications for temporary injunction in said causes, from which orders this appeal has been taken within thirty days from the rendition thereof.

D. Cases Sustaining the Jurisdiction of this Court of this Appeal.

Florida v. *United States,* 282 U. S. 194;
Beaumont, Sour Lake & Western Railway Company v. *United States,* 282 U. S. 74;
Ann Arbor Railroad Company v. *United States,* 281 U. S. 658;
St. Louis & O'Fallon Railway Co. v. *United States,* 279 U. S. 461, 481-2;
Virginian Railway Co. v. *United States,* 272 U. S. 658;
Chicago Junction Case, 264 U. S. 258, 262;
Louisville & Nashville R. R. Co. v. *United States,* 238 U. S. 1;
United States v. *Baltimore & Ohio R. R. Co.,* 225 U. S. 306.

We therefore respectfully submit that this Court has jurisdiction of this appeal.

Respectfully submitted,

FREDERICK H. WOOD,
WALTER MCFARLAND,
ELMER A. SMITH,
P. F. GAULT,
DOUGLAS F. SMITH,
H. H. LARIMORE,
J. N. DAVIS,
A. B. MASON,
R. J. HAGMAN,
M. L. COUNTRYMAN, JR.,
R. S. OUTLAW,
LESLIE CRAVEN,
WM. D. WHITNEY,
A. B. ENOCH,
D. P. CONNELL,
Solicitors for Appellants,
The Atchison, Topeka and Santa Fe Railway Company, et al.,
15 Broad Street,
New York, N. Y.

DICK DIXON,
FRANK A. LEFFINGWELL,
Solicitors for Appellants,
Terminal Grain Company, et al.,
Room 1901, Santa Fe Building,
Dallas, Texas.

August 14, 1931.

FILE COPY

NOV 13 1931

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1931

No. 287

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

APPELLANTS' BRIEF

WALTER MCFARLAND,
ELMER A. SMITH,
P. F. GAULT,
DOUGLAS F. SMITH,
H. H. LARIMORE,
J. N. DAVIS,
A. B. MASON,
R. J. HAGMAN,
M. L. COUNTRYMAN, JR.,
R. S. OUTLAW,
LESLIE CRAVEN,
A. B. ENOCH,
D. P. CONNELL,
DICK DIXON,
FRANK A. LEFFINGWELL,
Attorneys for Appellants.

FREDERICK H. WOOD,
WILLIAM D. WHITNEY,
G. HOWLAND CHASE,
Of Counsel.

November, 1931.

INDEX

PAGE

Statement 1

Specification of Errors 10

Pertinent Provisions of the Interstate Commerce Act 15

The Hoch-Smith Resolution 19

The Questions Presented 21

Summary of Argument 24

Argument 37

I. The report discloses that the Commission in making its order proceeded upon the assumption that it was required by the Hoch-Smith Resolution to establish the lowest possible lawful rates on agricultural products, affected by depression 37

II. It was the duty of the Commission to consider Sec. 15a 74

III. The effect of the order is materially to reduce the general level of the rates on a major description of traffic without any finding that the carriers' rate of return was, or in the near

PAGE

future, would be in excess of that contemplated by Section 15a, but, on the contrary, at a time when such rate of return was materially below the statutory requirement, and without any finding, or basis for finding, that such reduction would result in increased revenues through stimulating an increased volume of traffic.... 82

IV. The Commission may not establish the lowest possible lawful rates at a time when the carriers' rate of return is below the statutory standard. In so doing it not only proceeded upon a misconception of its powers but failed to discharge the duty imposed by Section 15a.... 87

V. The Commission's misconstruction of Section 15a and of the effect of the resolution upon its duties thereunder appears on the face of the report 110

VI. The Commission exceeded the power conferred by Sections 1 and 15 and applied a standard other than and different from the standards of said sections..... 125

VII. Assuming that the Commission may, in a proper case, establish the lowest possible lawful rates, irrespective of the carriers' rate of return, this is not such a case..... 137

VIII. The order of the Commission cannot be sustained by reason of the fact that the Commission at the same time readjusted many inequalities in rates, thereby removing discrimination 145

PAGE

IX. The ultimate finding which the report contains that the present rates are unreasonable to the extent that they exceed those prescribed is not in itself sufficient to support the order.. 146

X. The Commission considered matters outside of the record. For this reason alone, its order is void and its enforcement should be enjoined. 149

XI. The action of the Commission in overruling the carriers' petitions for rehearing and thus requiring the order to become effective and in failing to discharge the affirmative duty imposed by Section 15a to protect the carriers' revenues is so arbitrary and unreasonable as to render its order void and as to entitle the petitioners to enjoin its enforcement..... 154

TABLE OF CASES CITED

PAGE

American Express Co. v. *Caldwell*, 244 U. S. 617 ..... 47, 69, 94
Ann Arbor R. Co. v. *United States*, 281 U. S. 658 38, 44, 60, 80, 93, 95, 113, 116, 130, 134, 135, 138, 141, 143, 147
Atchison T. & S. F. Ry. Co. v. *United States*, 279 U. S. 768, 771, 777-9 65

Beaumont, S. L. & W. Ry. Co. v. *United States*, 282 U. S. 74, 86 ..... 50, 148
Bluefield Co. v. *Public Service Commission*, 262 U. S. 679, 688-689 148

Dayton-Goose Creek Ry. Co. v. *United States*, 263 U. S. 456, 478 ..... 40, 75, 92, 77, 78

Florida v. *United States*, 282 U. S. 194 ..44, 51, 81, 147

Interstate Commerce Commission v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93 152
Interstate Commerce Commission v. *Illinois Central R. R. Co.*, 215 U. S. 452, 470 155
Interstate Commerce Commission v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547 155

Minnesota Rate Cases, 230 U. S. 352 90

New England Divisions Case, 261 U. S. 184 .....89, 92
New York v. *United States*, 257 U. S. 591, 602 92

PAGE

Railroad Commission of Wisconsin v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585 ..... 89, 91, 92

Southern Pacific Co. v. *Interstate Commerce Comsion* (the *Williamette Valley* case), 219 U. S. 433 ..... 44, 81, 104, 137, 147

St. Louis & O'Fallon Ry. Co. v. *United States*, 279 U. S. 461 ..... 44, 81, 104

United States v. *New York Central R. R. Co.* (the *Passenger Scrip* case), 263 U. S. 603 ..... 81, 138, 140

United States v. *Abilene & Southern Ry. Co.*, 265 U. S. 274 152

TABLE OF INTERSTATE COMMERCE COMMISSION CASES CITED

PAGE

Arkansas Manufacturers and Jobbers Association v. *Director General*, 59 I. C. C. 662 66
Arkansas Jobbers and Manufacturers Asso. v. *C. R. I. & P. Ry.*, 80 I. C. C. 620 66

Benson Produce Company v. *Great Northern Railway Co.*, 113 I. C. C. 541 65
Board of Railroad Commissioners of State of Iowa v. *Director General*, 63 I. C. C. 405 66
Board of Trade of Kansas City, Mo. v. *A. & W. Ry. Co.*, 102 I. C. C. 285 66

California Growers & Shippers Protective League v. *S. P. Co.*, 129 I. C. C. 25; 132 I. C. C. 582 ... 38, 48, 57, 113, 142
California Growers & Shippers Protective League v. *S. P. Company*, 100 I. C. C. 79 38
Carnation Milk Products Co. v. *Director General*, 55 I. C. C. 665 65
Canned Goods from Colorado, New Mexico, Texas and Wyoming, 102 I. C. C. 156 65

Fifteen Per Cent. Case, 1931, 178 I. C. C. 539 .. 100, 156

Grain and Grain Products, 164 I. C. C. 619 72
Grain and Grain Products, 122 I. C. C. 235 ... 48, 71, 72, 94, 98

PAGE

Increased Rates, 1920, 58 I. C. C. 220, 226..... 75

Kansas Public Utilities Commission v. *A. T. & S. F. Ry.*, 83 I. C. C. 105..... 39, 85

Muller & Co. v. *Pere Marquette R. Co.*, 151 I. C. C. 787 ..... 48, 61, 64, 72, 96, 131

Ogden Grain Exchange v. *Arizona Eastern R. R. Co.*, 126 I. C. C. 255; 128 I. C. C. 490; 132 I. C. C. 46..... 63
Ogden Grain Exchange v. *Abilene & Southern Ry. Co.*, 122 I. C. C. 691..... 63

Railroad Commission of State of Iowa v. *Director General*, 63 I. C. C. 405, 410, 412..... 66
Rates on Grain, Grain Products and Hay, 64 I. C. C. 85 84
Rates and Charges on Grain and Grain Products, 91 I. C. C. 105.....39, 54, 59, 77, 84, 85, 137, 141
Reduced Rates, 1922, 68 I. C. C. 676..... 75, 100, 123

South Carolina Produce Assoc. v. *Aberdeen R. Co.*, 152 I. C. C. 5..... 48, 61, 64, 72, 131

Western Trunk-Line Class Rates, 164 I. C. C. 1 (decided May 6, 1930)..... 151

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 287.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

APPELLANTS' BRIEF.

Opinion Below.

The opinion of the Court below (R. 698) is reported in 51 Fed. (2d) 510.

STATEMENT

This is an appeal from orders of the District Court denying an application for an interlocutory injunction suspending and enjoining *pendente lite*, the enforcement of an order of the Interstate Commerce Commission (R. 708). There were two cases below, one brought by the principal railroads affected by the order, and one by shippers claiming to be adversely affected thereby, which

were consolidated for hearing (R. 628). The applications were heard by the court below on bill and answer, supplemented by affidavits.

The questions presented are questions of law going to the validity of the order of the Commission and arising on the face of the petition, and which, although no final decree was entered below, are believed to be determinative of all issues presented.

The order of the Commission is contained in an original order entered July 1, 1930 (R. 273) and a supplemental order entered April 10, 1931 (R. 324). The order specifically prescribed (1) over 2,000 specific rates between so-called "key points" applicable to wheat and flour, and an equal number applicable to corn and other coarse grains, (2) certain "Interior Scales" for application to interior movements (R. 272) and (3) directed the carriers to establish rates between all other points "in reasonable relation" to the rates so prescribed (R. 111).

Some rates were increased but the reductions predominated to such an extent that the general level of the new rates is 13% below that of the old (R. 18, 636).

The resulting annual loss in revenues to the carriers is estimated by a concurring Commissioner at "at least $15,000,000 * * *—perhaps more" (R. 187), and by the carriers at approximately $20,000,000 (R. 18, 637-654).

The order complained of was made in a proceeding entitled "Rate Structure Investigation, Docket No. 17000" (R. 273). This proceeding was instituted by the Commission, pursuant to the Hoch-Smith Resolution (R. 45), as an inquiry into the entire rate structure of the country for the purpose of bringing the same into

harmony with all provisions of the Act, including Section 15a (R. 7, 45, 76, 273, 274). This general investigation was divided by the Commission into a number of parts, and one of these, Part 7, (hereinafter referred to as the "Grain Case" or the "present proceeding") was instituted to cover, among others, *all* of the rates of *all* of the carriers in the Western District (comprising two of the four rate groups into which the Commission has divided the United States pursuant to Section 15a (R. 8, 9, 10, 59, 75)) on grain and grain products (R. 7, 8, 59).

Prior to the adoption of the Hoch-Smith Resolution the Commission had twice approved the general level of the rates, *Kansas Public Utilities Commission* v. *A. T. & S. F. Ry.*, 83 I. C. C. 105 (R. 327), and *Rates and Charges on Grain and Grain Products,* 91 I. C. C. 105 (R. 341). The second of these cases was decided July 10, 1924, less than seven months prior to the adoption of the Resolution. In so doing, the Commission had found that the rates were not unreasonable, were not unfairly related to the rates on other commodities, did not impose an undue burden upon the grain traffic and could not be reduced consistently with the requirements of Sect[redacted]5a.

In *Rates and Charges on Grain and Grain Products, supra,* the Commission also carefully considered the condition of agriculture which it found to be depressed (R. 367-379, 399). It also found that the benefit, if any, accruing to the average farmer from a substantial reduction in rates would be slight (R. 386-7, 400), while the effect of such reductions upon the carriers' revenues and financial condition would be immediate and severe (R. 400). The report in the present proceeding found that

the condition of agriculture, although still depressed, was somewhat improved (R. 76-7), and that the effect of a reduction in rates on the producer was more or less speculative (R. 93).

It appears from the report that the carriers' rate of return and financial condition had not improved in the interim; that in the year last preceding the close of the record (1927; R. 8) such rate of return was 3.96 and that the average return for an eight year period considered by the Commission was 3.9 (R. 77). The Commission itself (through its legislative committee) is authority for the statement that the carriers have never, since the enactment of the Transportation Act, earned the fair rate of return contemplated thereby (R. 8, 521).

The rates established were established as the lowest possible lawful rates (R. 150, 168). This phrase owes its origin to the third paragraph of the resolution. The prescription of "the lowest possible lawful rates" presuppose the existence of other and higher figures, which, if prescribed, would have also been reasonable and lawful. The effect of the order is to reduce the revenues of the carriers, in the amounts stated, at a time when their rate of return was far below that contemplated by Sec. 15a. This effect resulted through the establishment of the lowest possible lawful rates on agricultural products affected by depression.

The Commission, in addition to twice approving the general level of the rates, had itself largely approved or prescribed the specific rates in effect (R. 13-14, 110, 327, 341). Included within these were rates approved or prescribed as maximum reasonable rates during the pendency

of the case (R. 23, 28, 29, 30). The rates so approved or prescribed are materially reduced by the order (R. 24, 28, 29, 30, 244 *et seq.*). Among them were rates approved or prescribed by the Commission, during the pendency of the present proceeding, as *maximum* reasonable rates subject only to the reserved jurisdiction to determine, in the present proceeding, whether they were also the *lowest possible lawful rates* referred to in the resolution (R. 23-4). The percentage of reduction made in these rates is approximately the same as that made in the general level of all rates (R. 250, 251, 247, 272).

The report contains no findings in respect of the relation of the rates to the rates on other commodities, or of the cost or value of the service, and no facts upon which findings in respect thereof could be predicated. In this it is in marked contrast to the cases decided prior to the adoption of the Hoch-Smith Resolution and to the reports of the Commission in other important cases relating to the reasonableness of rates under the standards of the Interstate Commerce Act. The facts appearing in the report are, in themselves, entirely insufficient to support the order, unless the Commission was empowered to establish the lowest possible rates on agricultural products affected by depression, by reason of such depression, and was directed by the resolution so to do. This appears to have been the conception of the Commission's powers and duties on which the order was based.

It appears from the report that although the carriers' rate of return was far below that contemplated by Section 15a, the Commission was of the opinion that the reductions required would not "threaten the maintenance

of an adequate system of transportation" (R. 148). The Commission appears to have been of the view that, by reason of the resolution, it was discharged, in this proceeding, from giving effect to the requirements of Section 15a in determining the rates to be established on agricultural products affected by depression, provided *only* that it was of the opinion that the action taken would not immediately threaten the maintenance of an adequate system of transportation. In this it is believed that the Commission erred. On this theory, however, a finding in respect of the effect of the action proposed upon the maintenance of an adequate system of transportation was the finding of a material fact. The finding so made was based upon matters outside the record (R. 31-32, 533).

The order of the Commission, entered July 1, 1930, was based on a record closed on September 22, 1928 (R. 8). Since the close of the record the earnings of the carriers and their financial condition have been adversely affected to a material and alarming degree on account of changed conditions subsequently arising and still present. Among such changed conditions is the continued and continuing decline both in gross and net revenues, which has taken place in spite of the drastic decreases in carriers' expenditures for maintenance and in the number of carriers' employees. The rate of return, which was 3.92 in 1927 (the year preceding the close of the record) and 4.35 in 1928 (the last year considered by the Commission in its report) (R. 77), had become reduced to 3.1 in 1930 (R. 518), and in January 1931 (when the carriers filed a second petition for rehearing) had been still

further reduced by reason of the continuing decline in the volume of traffic handled (R. 513).

These facts were brought to the attention of the Commission as they developed, (1) in a petition for rehearing filed on September 6, 1930 denied November 11, 1930 (R. 421), (2) in statements submitted on November 6, 1930 and November 26, 1930 (R. 501) by a committee of the Western Association of Railway Executives in support of an application for postponement by reason of then critical conditions of the carriers (R. 468) and (3) in a further petition for rehearing filed February 18, 1931 (R. 507). No effect was given by the Commission to the request of the Railway Executives, and the second petition was denied on March 3, 1931.

The carriers' second petition for rehearing set forth in great detail the facts bearing upon their existing financial condition and the effects of the order. It alleged, among other things:

> (1) That the carriers had never, since the enactment of the Transportation Act, received the fair rate of return contemplated thereby. That in the year 1929 their net railway operating income, the largest in their history, was $90,000,000, less than 5.75% on a minimum and inadequate basis of valuation (R. 521, 517).
>
> (2) That the report was based upon a record closed in September 1928, since which time conditions had materially altered for the worse (R. 510); that their net operating income for the year 1930 was less by more than $100,000,000 than the average net operating income for the five years immediately preceding (R. 519), and was not less

than $234,000,000, below the amount required to equal 5.75% on a minimum and inadequate valuation of the carriers' property (R. 518); and that their gross and net revenues in 1931 were materially below those of 1930 by reason of the continuing decline in the volume of traffic handled (R. 513).

(3) That since the close of the record the aforesaid and other changed conditions had been such as seriously to impair the credit and adversely to affect the marketability of their securities, to place in jeopardy the retention thereof as investments for savings banks and trustees, to threaten the maintenance of an adequate system of transportation, and to impair the ability of the carriers to provide the same (R. 529).

(4) In addition, they alleged and offered to prove that the traffic in grain and grain products, which the report shows constitute one of the largest single descriptions of traffic carried (it appearing from the report that 12.1% of the carriers' revenue is derived therefrom; R. 78) was the only major description of traffic, the volume of which had not declined during the present period of depression, and which was moving in substantially the same volume as at the time when the record was made up and closed; that said traffic was moving freely at existing rates and would not be increased by reduction therein, the volume of movement being determined by the size of the crop and not by the rates (R. 512-3).

In this petition also the carriers directed the attention of the Commission to:

(5) The fact that the Commission's finding in respect of the effect of the order upon the main-

tenance of an adequate system of transportation had been based upon estimates, which were not a part of the record, and in respect of which the carriers, prior to the making of the order, had had no opportunity to check the same, cross-examine their maker, or submit counter estimates. The petition further alleged and offered to prove that the Commission had underestimated the losses from the order and had overestimated increases in revenue, supposed to result from increases granted in other cases, and alleged and offered to prove that there were, in fact, no other cases out of which any substantial increases in the carriers' revenues would result from the action taken by the Commission (R. 533).

The order of the Commission had not at the time become effective. The powers and duties imposed by the Commission are of continuing character, including the duty imposed by Section 15a. Its orders should be responsive to conditions of the present and immediate future. It is believed that in denying this petition for rehearing, within thirteen days after it was filed, the Commission was actuated by a mistaken conception of its powers and duties, and particularly by a misconception of its duties, as affected by the Hoch-Smith Resolution, with regard to rates on agricultural products affected by depression. Otherwise, it is the contention of the carriers that, in denying said petition and by so doing requiring the order, based upon a record which had ceased to be representative of present or immediately future conditions, to become effective the Commission acted so arbitrarily and unreasonably as to render the same void.

SPECIFICATION OF ERRORS.

A specification of such of the points raised by the assigned errors as are intended to be urged, is that:

1. The District Court erred in not holding that the order of the Commission was void by reason of the fact that by employing the lowest possible lawful rates as a standard for the measurement of either the existing rates or for the determination of reasonable maximum rates under Sections 1 and 15 of the Interstate Commerce Act, the Commission exceeded its powers and duties (IV, VI, XIII).

2. The District Court erred in not holding that the order of the Commission was void because based upon a misinterpretation and misconception of Section 15a of the Interstate Commerce Act and of its powers and duties thereunder (X, XXV, XXVI).

3. The District Court erred in not holding that the order of the Commission was void because in the making thereof the Commission failed to give effect to the provisions of Section 15a and violated and disregarded its duties thereunder (IX, XXI).

4. The District Court erred in not holding that the order of the Commission was void by reason of the fact that in prescribing the lowest possible lawful rates as the maximum reasonable rates under Sections 1 and 15 of the Interstate

Commerce Act the Commission established grain and grain products as a favored class, applied thereto standards of reasonableness other than and different from those provided by the Interstate Commerce Act for the determination of reasonable rates on other commodities and relieved the same from making their proper contribution to the requirements of Section 15a of the Interstate Commerce Act, contrary to the powers and duties imposed upon the Commission by the Interstate Commerce Act (XII, XIII).

5. The District Court erred in not holding that the order of the Commission was void by reason of the fact that in considering the effect of the proposed reductions on the maintenance of an adequate system of transportation and in making its finding of fact in respect thereof, the Commission erroneously relied on and considered matters not of record in the proceedings before it (XI).

6. The District Court erred in not holding that the order of the Commission was void because based upon an erroneous interpretation of the Hoch-Smith Resolution and of its effect upon the powers and duties of the Commission under the Interstate Commerce Act (III, XIV).

7. The Court erred in not holding that the action of the Commission in denying the carriers' petitions for rehearing and by so doing in requiring the rates prescribed in its order to become

effective in the future without any rehearing because of changed conditions set forth therein, was taken in disregard of and in violation of the duties imposed upon it by the Interstate Commerce Act, was arbitrary and unreasonable, constituted an abuse of its administrative discretion and was in excess of the authority conferred upon it by law, denied to the carriers an opportunity to be heard, and constituted a denial of due process of law, in violation of the Fifth Amendment of the Constitution of the United States (XVI, XXVIII, XXIX).

8. The District Court erred in holding that the order complained of was supported and justified by the findings contained in the Commission's report and in not holding that the findings and recitals therein were insufficient to sustain the order (I, XXIII, XXIV, XXVII).

9. The Court erred in holding in effect that the statement of the Commission that its findings were made under the provisions of the interstate commerce act, was binding upon the Court in respect of the nature of the action taken by the Commission and the legal basis therefor, and that by reason of the inclusion of said statement in the report, any error which the Commission committed was one of fact and not of law (II, XXII, XXIV).

10. The District Court erred in not holding that it was not necessary either to reduce the

general level of rates on grain and grain products or the revenues of the carriers therefrom, in order to correct such inequalities and discriminations as the Commission found to exist, and that the reductions of such character, which were in fact made by the Commission, were not incidental to such corrections (XX).

11. The District Court erred in not holding that there was reasonable probability that the petitioners would succeed on final hearing (XIX).

12. The District Court erred in not finding that unless the order of the Commission was stayed or suspended through the granting of an interlocutory injunction, the petitioners would suffer irreparable injury (XVII, XVIII).

13. The District Court erred in finding that the temporary restraining order should be dissolved and application for temporary injunction should be denied, and in not finding that said application should be granted (VII, XXX).

14. The District Court erred in holding that in determining the validity of the order of the Commission, the concurring opinions of certain members thereof, as well as the report of the Commission as a whole, should not be considered (VIII).

15. The Court erred in not holding that the Commission was in error in requiring the Great Northern Railroad Company, the Northern Pacific Railway Company, the Chicago, Milwaukee,

St. Paul and Pacific Railway Company and Oregon-Washington Railroad & Navigation Company to cease and desist from making a separate charge for transit on certain of their lines (XXXI).

PERTINENT PROVISIONS OF THE INTERSTATE COMMERCE ACT.

"Sec. 1 (5): All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * *"

"Sec. 3 (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Sec. 14. (1) That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

"Sec. 15 (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the

Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and

shall conform to and observe the regulation or practice so prescribed."

"Sec. 15a (1) When used in this section the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term 'carrier' means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this Act, excluding (*a*) sleeping-car companies and express companies, (*b*) street or suburban electric railways unless operated as a part of general steam railroad system of transportation, (*c*) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and (*d*) any beltline railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof; and the term 'net railway operating income' means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate

value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

"(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided,* That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

"(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. * *"

THE HOCH-SMITH RESOLUTION.

(Joint Resolution of January 30, 1925; U. S. Code title 49, sec. 55.)

"That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.

"That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution the Commission shall give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years, to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation. In the progress of such investigation the Commission shall, from time to time, and as ex-

peditiously as possible, make such decisions and orders as it may find to be necessary or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates. Such investigation shall be conducted with due regard to other investigations or proceedings affecting rate adjustments which may be pending before the Commission.

"In view of the existing depression in agriculture, the Commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service: *Provided,* That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the Commission involving rates on products of agriculture, and that such cases shall be decided in accordance with this resolution."

THE QUESTIONS PRESENTED

In making its order the Commission proceeded upon the assumption that it was empowered, under the Interstate Commerce Act, and directed by the Hoch-Smith Resolution, to prescribe "the lowest possible lawful rates" on agricultural products affected by depression (See Analysis of the Report, p. 37 *infra*). Such, as we understand it, was the position taken by counsel for the Commission in the Court below. The prescription of the lowest possible lawful rates (by whatever standard measured) necessarily presupposes the existence of other and higher rates which might have been prescribed in lieu thereof, which, if prescribed, would likewise be within the zone of reasonableness and hence reasonable and lawful.* The report of the Commission contains no finding that the carriers' rate of return exceeded the statutory standard, and it appears from the report that it was and for a long period of years had been far below the same (R. 77). The Commission found that the condition of agriculture was depressed and that among the products affected thereby were grain and grain products (R. 77). It also found that the effect upon the producer of a reduction in the rates was "more or less speculative" (R. 93). The proceeding was instituted under the Hoch-Smith Resolution and as such was a part of a general inquiry into all of the rates of the car-

*See *Grain and Grain Products*, 122 I. C. C. 235 (264) in which the "lowest possible lawful rates" are defined as being the *lowest* rates "falling within" the "flexible limits" of the Commission's "discretion"; *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624; and argument of the *United States* in *Ann Arbor R. Co.* v. *U. S.*, *supra*, at p. 661; also R. 169.

riers for the purpose of bringing the rate structure into harmony with all provisions of the Interstate Commerce Act (R. 7, 15, 45-56); but the order was entered in this proceeding independently of the other parts of such general inquiry. The rates prescribed were prescribed as maximum reasonable rates (R. 273-4). The facts stated give rise to the following questions:

> (1) May the Commission, on such a state of facts, reduce existing rates (whether reasonable or unreasonable) to the level of the lowest possible lawful rates, as defined above, and thereby prevent the carriers *pro tanto* from earning, as nearly as may be, the fair rate of return contemplated by Section 15a?
>
> (2) May the lowest possible lawful rate be made the standard for the determination of maximum reasonable rates under Section 15(1)?
>
> (3) Assuming the foregoing questions to be answered in the affirmative (and it is our position both should be answered in the negative), did the resolution make it the duty of the Commission, under such state of facts, to prescribe the lowest possible lawful rates on agricultural products affected by depression?
>
> (4) May the Commission either under the Hoch-Smith Resolution or independently thereof, establish the lowest possible lawful rates, under the facts stated, solely because of an existing depression in the industry affected?
>
> (5) If the order of the Commission was made out of deference to the supposed hopes or wishes of Congress believed to be expressed by the resolution (although not amounting to a positive command), may the order be sustained?
>
> (6) Did the Commission (and the answer to this question involves of necessity a further review

of the facts) in reducing rates approved or prescribed, under the standards of the Interstate Commerce Acts, in cases decided prior to the adoption of the Hoch-Smith Resolution, apply the same standards or standards other and different therefrom?

The Commission found that, although the carriers' rate of return was far below the statutory standard (R. 77) and although the resulting loss in revenue would be substantial, the reductions made would not threaten the maintenance of an adequate system of transportation (R. 148). This was a material finding of fact, assuming (as we deny) that the Commission was either empowered or directed to prescribe the lowest possible lawful rates, under the facts stated, provided *only* that the Commission was of the opinion that the resulting reductions would not immediately threaten the maintenance of an adequate system of transportation. The finding made was based upon estimates of the probable effect of the reductions ordered and upon other estimates of the probable effect of increases said to have been granted in other cases (R. 148). None of these estimates were of record (R. 31-33, 654-656). The accuracy of both was challenged in a petition for rehearing in which the carriers offered to prove, among other things, that there were no other cases from which any substantial increase in revenues would result from rate increases authorized (R. 529, 532-534). The foregoing facts, therefore, give rise to an additional question:

(7) Is the order of the Commission void because a material finding of fact was based upon matters outside the record?

SUMMARY OF ARGUMENT.

I. The report discloses that the Commission in making its order proceeded upon the assumption that it was required by the Hoch-Smith Resolution to establish the lowest possible lawful rates on agricultural products, affected by depression (p. 37, *post*).

(1) As in *Ann Arbor R. R. Co.* v. *United States*, the reasonableness and lawfulness of the existing rates and the general level thereof had been approved by the Commission immediately prior to the adoption of the Hoch-Smith Resolution in a report which carefully considered and weighed all of the applicable standards of the Interstate Commerce Act (pp. 38-40, *post*). In marked contrast with this previous report and with all reports of the Commission in important cases, the report in the present proceeding contains neither finding nor consideration of the factors considered by the Commission in its reports in determining the reasonableness and lawfulness of rates under the standards of the Interstate Commerce Act. Chief among these factors are the relation of the rates to rates on other commodities or descriptions of service, the value of the service and the cost of the service (pp. 40-43, *post*).

(2) The absence from the report of any findings or review of facts relating to the factors customarily reviewed or found by the Commission in passing upon the reasonableness of rates under the standards of the Interstate Commerce Act coupled with the presence of certain other findings, is persuasive that the order was made either in response to a duty supposed to be created

by the Hoch-Smith Resolution to establish the lowest possible lawful rates on agricultural products affected by depression or in deference to the wishes and hopes therein expressed. The report contains no findings sufficient in themselves to support the order on any other theory (pp. 45-49, *post*). While the Commission is not required to make specific findings of fact, proper practice requires it so to do. Accordingly, the facts appearing on the report are sufficient in themselves to support the order on the theory stated but on no other is persuasive that it was based upon such conception of its powers and duties (pp. 49-52, *post*).

(3) The treatment which the report accords to the condition of agriculture on the one hand, and the carriers' rate of return and financial condition on the other, shows that the Commission was acting because of, if not wholly, under the resolution (pp. 52-60, *post*).

(4) That, in finding existing rates unreasonable to the extent that they exceeded those prescribed, the Commission applied a standard other than that commonly applied in the determination of a maximum reasonable rate, appears both from the nature of the action taken and from the report. The Commission itself had in other cases distinguished between maximum reasonable rates and the lowest possible lawful rates referred to in the resolution. Indeed, to say that a rate may at the same time be the lowest possible lawful rate and a maximum reasonable rate involves a contradiction of terms (pp. 61-73, *post*).

(5) The Commission evidenced its application of a standard other than that commonly applied in the determination of a maximum reasonable rate:

by making approximately the same percentage of reduction in rates approved or prescribed as reasonable maximum rates under Section 1 during the pendency of this proceeding (subject only to a reserved jurisdiction, to be exercised in the present proceeding, to determine whether they were also the lowest possible lawful rates, referred to in the Hoch-Smith Resolution), that is made in the general level of all the rates (pp. 62-64, *post*);

in materially reducing the rates prescribed, during the pendency of this proceeding, as maximum reasonable rates for application between southern Missouri, Arkansas, Louisiana and Texas, *i.e.*, throughout the entire Southwest (pp. 64-65, *post*);

by reducing the proportional rates out of primary markets (pp. 65-66, *post*);

by reducing an important proportional rate previously prescribed by the Commission as a minimum rate (p. 67, *post*);

by reducing the proportional rate from St. Louis to New Orleans which the carriers, during the pendency of this proceeding, were authorized to establish and at the same time to charge higher rates at intermediate points (p. 67, *post*); and

by the action taken in respect of readjustments made to remove discrimination (pp. 68-70, *post*).

The only permissible conclusion is that these reductions were made as a part of the purpose, disclosed by the report itself, to prescribe the lowest possible lawful rates on agricultural products and not for the purpose of establishing reasonable rates as judged by the customary standards of the act.

(6) The foregoing conclusions are supported by the concurring opinion of Commissioner Eastman which contains the only extended consideration of the applicable law to be found in the report (pp. 70-73, *post*). Although seven other commissioners filed concurring opinions, none dissented from the views expressed by Mr. Eastman (p. 72, *post*).

II. It was the duty of the Commission to consider Sec. 15a (p. 74, *post*).

(*a*) Section 15a must be taken into consideration by the Commission in a case of the character of the Grain case (quite apart from the fact that it is a part of a general rate structure investigation), as the Grain case embraces the general level of all the rates of all the carriers on a major description of traffic in two of the rate groups established by the Commission for the purpose of administering Section 15a (pp. 74-70, *post*).

(*b*) Assuming for the purposes of the argument that the Commission need give consideration to Section 15a only in a case dealing with the general level of all of the rates (and not in a case dealing with the general level of the grain rates), this proceeding is precisely that case, as it is a general investigation into the entire rate struc-

ture of the country instituted pursuant to the second paragraph of the Hoch-Smith Resolution, the Grain case being merely a part thereof so designated by the Commission for purposes of convenience (pp. 79-80, *post*).

(*c*) Since the Commission did give consideration to Section 15a, if it placed a wrong interpretation thereon, its order is void (p. 81, *post*).

III. The effect of the order is materially to reduce the general level of the rates on a major description of traffic without any finding that the carriers' rate of return was, or in the near future, would be in excess of that contemplated by Section 15a, but, on the contrary, at a time when such rate of return was materially below the statutory requirement, and without any finding, or basis for finding, that such reduction would result in increased revenues through stimulating an increased volume of traffic (pp. 82-86, *post*).

IV. The Commission may not establish the lowest possible lawful rates at a time when the carriers' rate of return is below the statutory standard. In so doing it not only proceeded upon a misconception of its powers but failed to discharge the duty imposed by Section 15a (pp. 87-109, *post*).

(1) Sections 1, 15 and 15a must be read together. Section 15a qualifies and controls the powers, which may be exercised under Sections 1 and 15 in any case in which the Commission is required to give the former consideration (pp. 87-88, *post*).

(*a*) Prior to the enactment of Sec. 15a the carriers as a whole were permitted to earn a fair return out of the aggregate of the separately established rates, if able to do so.

(*b*) The purpose and object of Sec. 15a was to insure the receipt of an aggregate revenue by the carriers as a whole sufficient to support an adequate system of transportation.

(*c*) Congress itself fixed the standard by which such adequacy is to be determined, *viz.*, by the application to the revenues of the carriers as a whole of Amendments V and XIV of the Constitution, limiting the right of public authority to establish rates for a local single product public utility and therefore applicable to individual carriers only.

(*d*) For this purpose and as the means of its accomplishment Congress imposed upon the Commission an affirmative duty so to adjust rates as to produce the desired result, as nearly as may be, through the exercise of the powers theretofore conferred by Sections 1 and 15 (pp. 88-93, *post*).

(2) The Commission may not consistently with the requirements of Sec. 15a prescribe the lowest possible lawful rates in the absence of a finding that the group rate of return received by the carriers exceeds the statutory standard or at a time when it is materially below the same, where the effect of such action is to deprive the carriers *pro tanto* from earning such rate of return (pp. 94-100, *post*).

(2*a*) The prescription of the lowest possible lawful rates necessarily presupposes the existence of other possible rates which, if prescribed would be within the zone of reasonableness and hence reasonable and lawful under Section 1 (pp. 94-96, *post*).

(2*b*) The prescription of such rates at such a time results in the making of rates lower than are necessary to meet the requirements of Sec. 1 and *pro tanto* prevents the carriers from receiving as nearly as may be a fair return (pp. 96-97, *post*).

That the Commission so proceeded affords the only reasonable explanation of the treatment accorded to the carriers successive efforts to secure a postponement of the order and a rehearing (pp. 122-124, *post*).

(2*c*) The fundamental error of the Commission lay in its failure to recognize that in a proceeding in which the Commission was required to consider Section 15a that section required the Commission to exercise the powers theretofore conferred by Sections 1 and 15, to determine the points in the zone of reasonableness at which rates should be established, so as to produce, out of the aggregate of all such rates, a fair rate of return, as nearly as may be. Otherwise, that section is rendered meaningless (pp. 97-100, *post*).

(3) Recapitulation of the true import of Section 15a and of its relation to the powers of the Commission under other sections of the Act (pp. 100-102, *post*).

It follows from the foregoing:

(1) Sec. 15a is not a mere permission to earn out of the aggregate of rates established a fair

return, if possible. It imposes upon the Commission the positive duty to establish such rates as to achieve such result as nearly as may be.

(2) The rate structure and the level of the rates to be established are to be determined by reference to the required rate of return, not by conclusions of the Commission independently thereof as to what is good for the country or the carriers, or what kind of a structure, in its opinion, is necessary for the maintenance of an adequate system of transportation.

(3) Sec. 15a becomes a part of the standards of Sec. 1, which must be read and applied with respect thereto. Sec. 15a therefore limits the Commission in the exercise of the powers theretofore conferred by Sec. 1 to the extent necessary for the achievement of the purpose of the former.

(4) Sec. 15a does not prohibit the Commission from reducing particular rates or classes of rates when clearly unreasonable, *i.e.*, above the upper boundary of the zone of reasonableness. It does forbid the Commission, (in a case where the existing rates are above the upper boundary of the zone of reasonableness, just as much as in a case where the existing rates are within the zone of reasonableness), either to fix *all* rates at the lowest possible lawful level, thus preventing *all* possibility of achieving the statutory rate of return, or to fix the rates of any major description of traffic at the lowest possible lawful level, where

the effect is *pro tanto* to prevent the receipt of such return. The Commission may not, therefore, establish the lowest possible lawful rates on a substantial volume of traffic, where the carriers' rate of return is at the time inadequate, or in the absence of a specific finding that it exceeds or in the near future will exceed the statutory rate.

(5) The Commission may not establish the lowest possible lawful rates on a substantial volume of traffic upon the theory that such reductions will increase revenues by increasing movement, without a specific finding to that effect.

(4) The rates prescribed were prescribed as the lowest possible lawful rates (pp. 103-105, *post*).

(5) The action of the Commission may not be sustained by a reference to the phrase "as nearly as may be" which Sec. 15a contains (p. 105, *post*).

(6) The order of the Commission would have been void, if it had contained, which it did not, a specific finding that the rates were unfairly related to the rates on other traffic (pp. 106-109, *post*).

V. The Commission's misconstruction of Section 15a and of the effect of the resolution upon its duties thereunder appears on the face of the report (pp. 110-124, *post*).

(1) The Commission either (*a*) erroneously construed Section 15a as being merely permissive and as

permitting the Commission to substitute a standard of its own for the statutory standard established thereby, or (*b*) construed the resolution as discharging it in the proceeding before it from the affirmative duty to imposed generally by Section 15a (pp. 110-117, *post*).

(2) The Commission, if it did not wholly misconceive its duties under Sec. 15a, proceeded upon the erroneous assumption that, because of the resolution, it was directed to establish the lowest possible lawful rates in this proceeding, although at or after the conclusion of the general investigation, of which it was a part, it might be required to advance the general level of all rates, including grain rates, in order to discharge the duty imposed by Sec. 15a (pp. 118-122, *post*).

VI. The Commission exceeded the power conferred by Sections 1 and 15 and applied a standard other than and different from the standards of said sections (pp. 125-137, *post*).

If it be true that Section 15a qualifies Section 1, then it is clear that in establishing the lowest possible lawful rates on grain and grain products in the absence of a finding that the carriers' rate of return exceeded the statutory standard and at a time when, on the contrary, it was materially less, the Commission exceeded the authority conferred by Section 1, as well as acted in disregard of Section 15a.

There are other reasons why in so doing it exceeded the power conferred by Sections 1 and 15.

(1) The carriers were ordered not to charge rates to exceed those prescribed by the Commission. The rates

were therefore prescribed as maximum reasonable rates, not as minimum rates (pp. 125-126, *post*).

(2) The exercise of the power to prescribe a minimum rate is the exercise of the power to prescribe the lowest possible lawful rate, *i.e.*, one below which the carrier may not lawfully go. It may not at the same time be the standard of a maximum rate (pp. 126-129, *post*).

(3) The lowest possible lawful rate may not be used as the measure for the determination of maximum reasonable rates (pp. 129-132, *post*).

(3*a*) Counsel for the Commission in the Court below conceded that it could not be made the measure of determining the lawfulness of existing rates (pp. 129-130, *post*).

(3*b*) Neither it may be made the measure for determining the maximum rates to be established in lieu of those found to exceed such maximum (pp. 130-132, *post*).

(4) It appears from the report as a whole, as well as from the action taken, that the reasonableness and lawfulness of existing rates, as well as those prescribed for the future, were measured by comparison with the lowest possible lawful rates, referred to in the resolution. In so doing the Commission applied a standard, the use of which was erroneously supposed by it to be required by the resolution, and which but for the resolution it would not have been required to employ (pp. 132-136, *post*).

VII. Assuming that the Commission may, in a proper case, establish the lowest possible lawful rates, irrespective of the carriers' rate of return, this is not such a case (pp. 137-144, *post*).

(1) The Commission is not empowered by the Act to establish the lowest possible lawful rates, because of a depression in the industry affected, and certainly not at a time when the carriers' rate of return is far below the statutory standard (pp. 137-139, *post*).

(2) The resolution did not make it the duty of the Commission so to do. Nor may the order be sustained, if made out of deference to the supposed wishes of Congress, expressed therein, but not amounting to a direction (pp. 140-141, *post*).

(3) The Commission's error arose from its failure to perceive the conflict between the conception of its powers and duties, under which it acted, and the decision in *Ann Arbor R. Co.* v. *United States,* as evidenced by the interpretation placed upon that decision in the concurring opinion of Commissioner Eastman, said by him not to be in conflict therewith, and which contains the only extended review of the applicable law to be found in the report (pp. 141-144, *post*).

VIII. The order of the Commission cannot be sustained by reason of the fact that the Commission at the same time readjusted many inequalities in rates, thereby removing discrimination (pp. 145-146, *post*).

IX. The ultimate finding which the report contains that the present rates are unreasonable to the extent that

they exceed those prescribed is not in itself sufficient to support the order (pp. 146-148, *post*).

X. The Commission considered matters outside of the record. For this reason alone, its order is void and its enforcement should be enjoined (pp. 149-153, *post*).

XI. The action of the Commission in overruling the carriers' petitions for rehearing and thus requiring the order to become effective and in failing to discharge the affirmative duty imposed by Section 15a to protect the carriers' revenues is so arbitrary and unreasonable as to render its order void and as to entitle the petitioners to enjoin its enforcement (pp. 154-160, *post*).

(1) The carriers submitted in petitions for rehearing and offered to prove facts showing a fundamental change for the worse in the condition of their revenues and the relation thereto of the grain rates, in the years following the close of the record herein and prior to the effective date of the order herein. These petitions were summarily denied by the Commission, which thereby put the order into effect on a record closed nearly three years before (pp. 154-157, *post*).

(2) In the main report the Commission had based its decision in part upon an anticipation that its failure to provide adequate revenues would prompt the carriers to bring future proceedings to protect those revenues, and to that extent based its decision in part upon a mere chance that it would prove right instead of basing it exclusively (as was its duty) upon the evidence before it (pp. 157-160, *post*).

ARGUMENT

I

THE REPORT DISCLOSES THAT THE COMMISSION IN MAKING ITS ORDER PROCEEDED UPON THE ASSUMPTION THAT IT WAS REQUIRED BY THE HOCH-SMITH RESOLUTION TO ESTABLISH THE LOWEST POSSIBLE LAWFUL RATES ON AGRICULTURAL PRODUCTS, AFFECTED BY DEPRESSION.

If the Commission was possessed of such power and was directed by the Hoch-Smith Resolution to exercise it in respect of such products, but two issues were presented to the Commission for determination:

(1) Was the condition of agriculture depressed and were grain and grain products among the products affected thereby?

(2) What were the lowest possible lawful rates capable of being prescribed?

That the Commission proceeded upon such conception of its powers and duties and hence of the issues before it is shown (1) by the emphasis placed upon the condition of agriculture as compared with all other questions, (2) by the interpretation placed upon the relation of Sec. 15a to the case and the treatment accorded such section in the report, (3) by the report as a whole, including the concurring opinions, (4) by the absence from the report of any consideration of the factors customarily considered in determining the reason-

ableness of rates and which the Commission, prior to the adoption of the resolution, had considered and applied to other cases dealing with the same subject matter, and (5) by the nature and extent of the reductions made in rates so recently approved or prescribed as maximum reasonable rates, including rates so prescribed after the adoption of the resolution.

1. As in *Ann Arbor R. Co. v. United States*, the reasonableness and lawfulness of the existing rates and the general level thereof had been approved by the Commission immediately prior to the adoption of the Hoch-Smith Resolution in a report which carefully considered and weighed all of the applicable standards of the Interstate Commerce Act.

In *California Growers & Shippers Protective League v. S. P. Company*, 100 I. C. C. 79, the Commission approved the then existing rates on deciduous fruits from California to Eastern destinations after careful consideration of all of the factors entering into the determination of the reasonableness and lawfulness of such rates under the Interstate Commerce Act. Subsequently, in *California Growers & Shippers Protective League* v. *S. P. Company*, 129 I. C. C. 25, 132 I. C. C. 582, instituted after the adoption of the Hoch-Smith Resolution, the Commission required substantial reductions to be made in the rates previously approved, primarily because of the Resolution and the depression in the industry. It was the order in this case that was set aside by this Court in *Ann Arbor R. Co.* v. *United States.*

The general level of the grain rates reduced in the present proceeding had been but recently approved in

Kansas Public Utilities Commission v. *A. T. & S. F. Ry. Co.*, 83 I. C. C. 105 (R. 327), and in *Rates and Charges on Grain and Grain Products*, 91 I. C. C. 105 (R. 341).

The second of these cases was decided July 10, 1924 (R. 341), less than seven months prior to the adoption of the Hoch-Smith Resolution, under which the present proceedings were instituted. The report in that case carefully reviewed and weighed the factors commonly entering into the determination of the reasonableness and lawfulness of rates under the Interstate Commerce Act (R. 359 *et seq.*). It also held that it was required to consider and give effect to the requirements of Sec. 15a, since the effect of any reduction in the rates upon the carriers' rate of return would be direct and substantial (R. 400). It held, as it had in the previous case, that the rates on grain and grain products were not unfairly related to the rates on other commodities, cast no undue burden thereon, and could not be reduced consistently with the requirements of Sec. 15a (R. 399-400). It also gave consideration to the condition of agriculture, which it found to be depressed, and to the weight which should be given to such depression. The existence of such depression, it rightly held (*Ann Arbor R. Co.* v. *United States, supra*) could not in itself be made the basis of a reduction in rates, but could be given only such weight as it was entitled to as affecting the value of the service, one of the elements considered and discussed in the report (R. 379). It also found that the benefit to the farmer, if any, resulting from a substantial reduction in rates would be exceedingly slight, while the effect upon the carriers, whose

rate of return was already far below that contemplated by Sec. 15a, would be immediate and severe (R. 387, 400).

2. In marked contrast with its previous reports and with all reports of the Commission in important cases, the report in the present proceeding contains neither finding nor consideration of the factors commonly considered by the Commission in its reports in determining the reasonableness and lawfulness of rates under the standards of the Interstate Commerce Act.

Chief among those factors are the relation of the rates to rates on other commodities or on descriptions of service, the value of the service and the cost of the service.*

(A) RELATION OF THE GRAIN RATES TO THE RATES ON OTHER DESCRIPTIONS OF TRAFFIC.

The report in *Rates and Charges on Grain and Grain Products* (R. 341) devotes seven pages to a consideration of this question, and reviews statistics relating to sixty-nine different commodity groups of traffic, discussing the relative contribution of grain and grain products and of such other commodity groups to carload revenue (per car and per car-mile and per ton-mile), to total loaded car-miles and to ton-miles, considers the average relative

*See *Dayton-Goose Creek Ry. Co.* v. *U. S.*, 263 U. S. 456, 478, in which these factors are referred to as those which may be taken into account in passing upon the reasonableness of particular rates in cases where the Commission is not required to give consideration as well to the requirements of Sec. 15a.

haul per car, and per car-mile, goes into detail on the relationship of grain and grain products as a whole to hay, to other products of agriculture, to animals and their products, to the products of mines, of forests, of manufactures and miscellaneous, reviews evidence as to six particular Class I carriers, and considers the effect of Canadian competition and various other factors (R. 359-365). After this comprehensive study, the following carefully framed specific findings were made. (R.399):

> "(*a*) That rates on grain, grain products, and hay, generally speaking, are now on a somewhat lower basis compared with pre-war freight rates than are the carload rates on other traffic.
>
> "(*b*) That the earnings per car, per car-mile, and per ton-mile on grain and grain products, compared with other classes of traffic and with all carload traffic, do not show that grain and its products are now contributing more than their fair share to the revenues of the carriers in this group, considering the value of the traffic, the average hauls, the relative services performed, and the ratio of revenue produced by grain and grain products to total carload revenue compared with former years."

Contrast this with the report in the present case. There is not a single finding on the relation of the grain rates to the rates on other traffic; there is no recital of any facts bearing thereon and no discussion of the question whatsoever. At the outset of the report, the question is presented "whether, under present conditions, the rates on grain and grain products * * * are properly related to each other and to the rates on other traffic", and the

Commission points out that "the answer must take into account * * * comparisons of distance, transportation conditions and ton-mile and car-mile earnings on grain and other commodities" (R. 77). Yet, not once in the remainder of the report is there a comparison of distance or of transportation conditions or of ton-mile earnings or of car-mile earnings or of any other relevant data.

The question is presented, but the answer is missing and any consideration of the question is missing.

This contrast between the Commission's attitude in the two cases, dealing as they did with precisely the same subject-matter, is eloquent of the misconception that had come into the minds of the Commissioners, between the decision in the earlier case and the decision in the later case, as to their powers and duties.

(B) THE VALUE OF THE SERVICE.

This factor also is considered at length in the report in *Rates and Charges on Grain and Grain Products* (R. 379-381). There is a comparison of wheat and corn with salt, coal, cement, brick and other heavy-loading commodities to determine their relative purchasing power from the standpoint of "element of value". There is a comparison in detail of freight rates per ton and value of commodity per ton for the heavy-loading commodities over seven different distances ranging from 108 miles to 880 miles. The shifting prices for grain and its products are considered, and other market considerations are referred to. The result was a specific finding.

> "(*e*) That the present adjustment of rates on grain and its products from the 'element of

value' standpoint, compared with the other heavy-loading commodities, moving in volume, pointed to by complainants, as profiting by the disturbance in relative values, is not unfavorable to grain and grain products" (R. 399).

We venture to say that the report in the present case may be searched in vain for any reference to a consideration of this factor.

(C) THE COST OF THE SERVICE.

We have seen that the Commission gave no consideration whatsoever to the elements of the relationship of the grain rates to other rates, and of the value of the services rendered in hauling the grain. To the third factor customarily considered in passing upon the reasonableness of rates,—the factor of the cost of the service—the Commission did give consideration. But the nature of the consideration given is, if possible, more significant of the Commission's error than would be a complete absence of consideration. The Commission (R. 79-81) considers various analyses dealing with costs of transporting wheat. But after considering them, the Commission reaches no conclusion and makes no finding. Indeed, it is apparent from its discussion of this subject that this question was involved in such uncertainty and doubt as to admit of no conclusion or finding in respect thereof (see paragraph beginning at the bottom of R. 80). The Commission evidently considered the subject in the off-hand manner in which any subject would be considered by a tribunal which did not feel that the subject was necessary to a decision.

3. The absence from the report of any findings or review of facts relating to the factors customarily reviewed or found by the Commission in passing upon the reasonableness of rates under the standards of the Interstate Commerce Act, coupled with the presence of certain other findings, are persuasive that the order was made either in response to a duty supposed to have been created by the Hoch-Smith Resolution to establish the lowest possible lawful rates on agricultural products affected by depression or in deference to the wishes and hopes therein expressed.

The report thus contains no facts or findings of fact, in themselves capable of supporting the order, under the standards of the Interstate Commerce Act, save only the ultimate conclusion, expressed in the words of the statute, that all existing rates are unreasonable to the extent that they exceed those prescribed (R. 111). But such a conclusion, so expressed, may be examined by the Court in the light of the facts specifically found, the report as a whole (including the separate expressions of opinion by individual Commissioners) and of all other pertinent facts for the purpose of determining whether such ultimate conclusion is, or is not, based upon a misconception of the Commission's powers and duties, a misinterpretation of the statute or any other error of law. *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433, 443; *St. Louis & O'Fallon Ry. Co.* v. *United States*, 279 U. S. 461, 487; *Ann Arbor R. Co.* v. *U. S., supra; Florida* v. *United States*, 282 U. S. 194.

(A) THE REPORT CONTAINS NO FINDINGS SUFFICIENT IN THEMSELVES TO SUPPORT THE ORDER ON ANY OTHER THEORY.

The only facts appearing in the report, which have any bearing upon the action of the Commission in respect of the general level of the rates, as distinguished from its action in respect of the relation of the rates on grain and grain products to each other, are as follows:

(*a*) Relating to the Conditions of Agriculture.

(1) That the condition of agriculture, although improved, is still depressed, and that among the agricultural products affected by depression are grain and grain products (R. 76).

(2) That the effect of a reduction in the rates thereon on the producer is more or less speculative (R. 93).

(*b*) Relating to the Revenues of Carriers.

(3) That 12% of the revenues of the carriers in the Western District at current rates is derived from grain and grain products (R. 78).

(4) That the carriers' rate of return was and for a period of more than eight years preceding the entry of the report had been far below the statutory standard (R. 79).

(5) That the effect of the order will be to reduce substantially the revenues of the carriers (R. 148).

(6) That notwithstanding the inadequacy of the carriers' rate of return, the Commission is of the opinion that the readjustment required will not threaten the maintenance of an adequate system of transportation (R. 148).

The third paragraph of the Hoch-Smith Resolution provides:

> "In view of the existing depression in agriculture, the Commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service. * * * " (R. 17).

The rates prescribed were characterized by the Commissioner in charge of the case (Commissioner Meyer) as the lowest rates which could be lawfully prescribed (R. 150). Commissioner Eastman in a concurring opinion, which contains the only extended discussion of the applicable law, stated that the Commission was required by the resolution to establish the lowest possible lawful rates on agricultural products (R. 718, 722). The lowest possible lawful rate as defined in the argument made to this Court in *Ann Arbor R. Co.* v. *United States* is a rate which, although within the zone of reasonableness, is lower than might be made and still be within the zone, there being at the same time, as was said in the argument, a "highest possible lawful rate"

and "lowest possible lawful rate", each being in itself reasonable and lawful because within the zone of reasonableness. The existence of such a zone was recognized by this Court in *American Express* v. *Caldwell*, 244 U. S. 617, 624.* The phrase "the lowest possible lawful rate" owes its origin to the third paragraph of the Hoch-Smith Resolution.

The general level of the rates twice approved prior to the adoption of the Hoch-Smith Resolution (R. 17-18, 327, 341) is reduced 13% (R. 14, 636). In addition, the specific rates themselves, as appears from the report as well as from the petition, had been largely prescribed or approved by the Commission in previous cases (R. 110). Among the most important of these were cases in which the Commission approved or prescribed maximum reasonable rates in proceedings contemporaneously conducted but decided prior to the decision of this case (R. 23, 29). Among the cases so decided during the pendency of this proceeding were two in which the rates were approved or prescribed as maximum reasonable rates, subject only to a reserved jurisdiction, to be exercised in the present proceeding, to determine whether they were also the lowest possible lawful rates referred to in the Hoch-Smith Resolution (R. 23). The reduction made in such rates, presumably under the jurisdiction reserved, is approximately the same as in the general level of all rates (R. 250-1, 247, 272). The extent by which the new rates are less than the old, as well as the characterization of the former as "the lowest possible lawful rates" leaves no room for doubt that they were so prescribed. (*Infra*, pp. ~~43-55~~ 62-67).

*See also *Grain and Grain Products*, 122 I. C. C. 235 (264).

In its report in *California Growers & Shippers Protective League* v. *S. P. Company, supra,* and in the argument made in support of the order therein in *Ann Arbor R. Co.* v. *United States, supra,* it was asserted that the Commission was empowered by the Interstate Commerce Act and directed by the Hoch-Smith Resolution to prescribe the lowest possible lawful rates on agricultural products affected by depression, notwithstanding the fact that the carriers had not made the fair return contemplated by Section 15a, provided only that it was satisfied that the resulting reductions would not threaten the maintenance of an adequate system of transportation. The same power was asserted or exercised in *Muller & Co.* v. *Pere Marquette R. Co.,* 151 I. C. C. 787 and *South Carolina Produce Association* v. *Aberdeen R. Co.,* 155 I.C.C. 5, 27. That the Commission possesses such power was asserted in the Court below. The duty to exercise this power, because of the resolution, was asserted in *Grain and Grain Products,* 122 I. C. C. 235 as well as in the other cases cited.

A large part of the record was devoted to the condition of agriculture. This is the only part of the record reviewed at length in the report. It is summarized in an appendix of 37 pages (Appendix C, R. 206-243). Upon the basis thereof the Commission found that the condition of agriculture, although somewhat improved, is still depressed, and that grain and grain products are among the agricultural products affected by such depression (R. 77). Moreover, although the report found that the condition of agriculture was depressed, it also found that the effect upon the producer would be more or less

speculative (R. 93). It did not find and could not have found (*Infra*, p. 82 *et seq.*) that grain was not moving freely under the existing rates, or that reduction therein would increase the movements and hence the revenues of the carriers.

Whether the Commission possesses the power thus asserted, and whether the resolution directs it to exercise such power in respect of agricultural products, affected by depression, and because of such depression, are two of the principal questions of law in the case. It is our contention that, whether the Commission may exercise such power under any circumstances under Sections 1 and 15, it may not do so consistently with the duty, imposed by Section 15a, so to exercise the powers conferred by Sections 1 and 15 as to produce, as nearly as may be, a fair rate of return, at a time when such rate of return is far below the statutory standard. It is also our contention that, whether the Commission possesses and may exercise such power at that or any other time, the resolution does not make it its duty so to do because of the existence of a depression in agriculture. If, however, such were the powers and duties of the Commission, then the findings made fully support the order for the Commission found the existence of a depression in agriculture and that grain and grain products were among the products affected thereby. Otherwise the facts appearing on the report are insufficient to support the order.

(B) WHILE THE COMMISSION IS NOT REQUIRED TO MAKE SPECIFIC FINDINGS OF FACT, PROPER PRACTICE REQUIRES IT SO TO DO. THAT THE FACTS APPEARING ON THE

REPORT ARE SUFFICIENT IN THEMSELVES TO SUPPORT THE ORDER ON THE THEORY STATED BUT ON NO OTHER IS PERSUASIVE THAT IT WAS BASED UPON SUCH CONCEPTION OF ITS POWERS AND DUTIES.

While the Commission is not required by law to make specific findings of fact, proper practice requires it so to do. *Beaumont, Sour Lake & Western Ry. Co.*, 282 U. S. 74, 86.

In this case the report itself contains findings or statements of fact sufficient to support the order upon the theory stated, but in themselves wholly insufficient to support it on any other. Moreover, although the duty to make specific findings was removed by the *Hepburn* Act, Section 14(1), still makes it the duty of the Commission to make a report in writing which shall state the conclusions of the Commission, together with its decision, order or requirement in the premises. The object of this would appear to be to require the Commission to set forth in its report sufficient of its conclusions to indicate the basis of its action. A mere recital that the investigation involved the rates from A to B, and that the Commission found such rates to be unreasonable to the extent indicated would clearly not be such a report as the statute contemplates. The orders of the Commission are subject to judicial review. Manifestly, the courts should be relieved of the labor of examining all of the evidence before the Commission for the purpose of ascertaining the basis of its action and particularly so in a case such as this, where the record consisted of 53,000 pages of testimony and over 2,000 exhibits (R. 147).

The report on its face, therefore, gives rise to something more than a presumption that the action of the Commission was predicated upon that conception of its powers and duties under which, if correct, the facts appearing in the report were sufficient to sustain the validity of the order, rather than upon some other theory under which the facts appearing in the report would be insufficient to support it.

In *Florida v. United States*, 282 U. S. 194, the Court set aside an order of the Commission because of the absence of basic findings sufficient to support it. The report in that case did contain certain basic or evidentiary findings, in addition to the ultimate finding expressed in the words of the statute, but these findings the Court held were insufficient to support either the Commission's ultimate conclusion or the order based thereon. Under these circumstances, the Court said it was not called upon "to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit." It is true that that case related to intrastate rates, and in citing it we are not to be understood as suggesting that in cases dealing with interstate rates the Commission is required to make specific or basic findings. It would seem, however, that where, as in this case, the report contains findings or statements of fact sufficient to support the order on one theory only, the parties and the Court are entitled to assume that the order is based upon such theory and that the Court is not required, any more than in the *Florida* case, to examine the record to see whether it contains facts sufficient to have warranted the making

of other findings which, if present, would have supported the order on some other theory.

Indeed, it would appear that if the Court should pursue such course, it would run the risk of making findings, other than those which the Commission would have made, if it had felt called upon to make any, and would thus substitute its judgment for that of the Commission in an administrative matter. The foregoing facts and considerations are persuasive:

(*a*) That the order was based upon the theory that the Commission had the power asserted, and

(*b*) That the resolution made it its duty to exercise such power, if it found that grain and grain products were affected by depression.

4. The treatment which the report accords to the condition of agriculture on the one hand and the carriers' rate of return and financial condition on the other, shows that the Commission was acting because of, if not wholly under, the resolution.

(A) THE CONDITION OF AGRICULTURE.

As previously stated, the evidence relating to the condition of agriculture, to which a large part of the record was devoted, is the only part of the evidence reviewed by the Commission at length. This is done in an appendix (Appendix C, R. 206-243). From it the Commission concludes that the condition of agriculture, while improved since its last decision, was still depressed,

and that grain and grain products were among the agricultural products affected by depression (R. 76-7). This appendix is made a part of the report. It is printed in small type. If printed in the same type used in the main report, it would easily equal, if not exceed the main report in length.*

We are not suggesting that the validity of the order be predicated upon the number of pages devoted to one subject or another. The length of the appendix, together with the thorough-going review of the condition of agriculture which it contains certainly warrants the conclusion, however, that it was the subject uppermost in the mind of the Commission, particularly when contrasted with the few lines accorded in the report to the condition of the railroads and with the absence therefrom of any consideration of the factors customarily entering into the determination of the reasonableness of rates under the Interstate Commerce Act. Certainly the Commission regarded it as one of the major issues. If, as asserted in previous decisions of the Commission, and in the concurring opinion of Commissioner Eastman (R. 168) in this case, the resolution *required* the Commission to establish the lowest possible lawful rates on agricultural products affected by depression, the condition of agriculture presented not merely a major issue but the principal issue.

*The main body of the report is given over largely to a description of the grain traffic, the manner in which grain is marketed, the general characteristics of the present rate structure (which the order preserves without substantial change), certain incidents thereto such as "transit", the relation between rates on the several kinds of grain and between the rates on grain and grain products, and an extended description of the effect of the readjustment required.

That the Commission so regarded it is, we believe, in addition to being established by the importance attached to it in the report and in the concurring opinions of various members of the Commission, made plain by the contrast between the consideration given thereto and the treatment which the report accords to the carriers' rate of return and financial condition and by the conclusions reached from a consideration of both.

(B). THE CONDITION OF THE CARRIERS.

As distinguished from the lengthy Appendix, dealing with the condition of agriculture, the report devotes a single page to the carriers' rate of return and financial condition (R. 77-78).

It appears therefrom that the carriers' rate of return was and for the preceding eight years had been far below the statutory rate of return. It moreover appears that their rate of return and financial condition had not improved since the prior report in *Rates and Charges on Grain and Grain Products, supra.* The conclusions reached were based largely on the operations for the year 1923, in which the carriers' rate of return was 3.96. In the year immediately preceding the close of the record in the present proceeding (1927, R. 8) it was 3.92. The report discloses a slight improvement in 1928, and an average rate of return for the eight year period of 3.9. The Commission was, of course, fully aware of the depression existing in 1930, when the order was entered, and of the adverse effect of the same upon the carriers, although probably not the exact extent thereof. The precise extent thereof, however, was called to the atten-

tion of the Commission by the carriers' petition for rehearing, together with the continuing decline in revenue in so much of the year 1931 as had passed. These petitions for rehearing were filed before the order became effective (R. 280, 507).

The Commission in its report, after stating that it must take into account

> "whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by law, including Section 15a of the interstate commerce act"

then proceeds to construe said section as follows:

> "which we construe to permit, but not to guarantee, the carriers to earn 5.75 per cent on the fair value of the property devoted to the transportation service."

Section 15a, while not a guaranty, is, of course, more than a mere permission to the carriers to earn a fair return out of separately established rates, if they can get it. This permissive right existed prior to the enactment of Sec. 15a.

At the conclusion of its report under the heading "General Comment", the Commission says:

> "The action here taken represents the fullest possible response to all the mandates of the law affecting, among other things, the important subjects of levels and relations of rates, the natural and proper development of the country as a whole, and the maintenance of an adequate system of

transportation. The future volume of movement of wheat and other grains between specific points can not be accurately known. It follows that the revenue effects of the increases and decreases which will follow the effectiveness of our action herein cannot be precisely stated. We have made many different checks and estimates. *While the reductions far exceed the increases, and the corresponding revenue effects will be substantial,* the full effect upon revenues cannot be adequately foretold, in view of the limitations upon transit, the elimination of transit balances outbound from primary markets, and the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates. *We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation*" (R. 147). (Italics ours.)

Here we have the Commission's own carefully phrased description of the mandates of the law, to each of which it is said the order makes the fullest possible response. Among the mandates to which the order is said to be fully responsive is that requiring "the maintenance of an adequate transportation system". The order is said to be fully responsive to that mandate because, although the revenue effects will be substantial, the Commission is "satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation". In so stating the Commission could not have intended to say that the action taken was fully responsive to the mandate imposed by Sec. 15a, adopted by Congress as the means by which the maintenance of an adequate system of transportation was to be insured, since it ap-

peared from the report that the carrier's rate of return was already far below the standard of that section.

Language similar to that contained in the foregoing excerpt appears in the Commission's report in *California Growers' & Shippers' Protective League* v. *S. P. Co.*, 129 I. C. C. 25, 55. In that report the Commission said:

> "* * * While all the defendants who handle the bulk of the deciduous-fruit traffic have not as yet made the fair return, their present financial condition is relatively strong. It seems clear that the reduction requested, if granted, would not affect the maintenance of adequate transportation service."

In setting aside the order of the Commission this Court said (281 U. S. at pp. 667-668):

> "The third paragraph was construed by the commission as making a change 'in the basic law,' as placing agricultural products in a 'most favored' class, and as justifying a reduction in the rates on deciduous fruits moving from California to eastern points, nothwithstanding most of the carriers 'have not as yet made the fair return' *for which § 15a of the Interstate Commerce Act makes provision as a means of securing the maintenance of an adequate transportation system.*" (Italics ours.)

In both cases, therefore, the Commission was proceeding upon the theory that it was directed by the resolution to establish the lowest possible lawful rates on agricultural products affected by depression and because of such depression, irrespective of the existing inadequacy of return, provided only that it was of the opinion

that the immediate effects of such action would not be to threaten the maintenance of an adequate system of transportation.

This conclusion, appearing on the face of the report, is supported by the concurring opinions.

Commissioner Eastman was of the opinion that the resolution imposed such a duty to be performed "in the present proceeding" (R. 168, R. 172). At the same time he recognized the Commission's duty under Sec. 15a to see to it that the "general body of rates" was "sufficient * * * to produce * * * the fair return stipulated by that section" (R. 172) and that the performance of this duty might require a subsequent increase in the rates now made. Otherwise stated, according to this view, the Commission was discharged in the present proceeding from giving effect to the requirements of Sec. 15a and required to readjust the rates on agricultural products affected by depression without regard thereto.

Commissioner Lewis expressed the opinion "that the level herein prescribed is probably too low to be permanent" (R. 186).

Commissioner Woodlock was gravely apprehensive of the revenue effects of the order and expressed the opinion that if the rates prescribed were "to remain long in effect * * * they will produce a situation which will require emergency remedies if we are to maintain in that territory an adequate system of transportation" (R. 187).

While the main report contains no such observations, the inadequacy of the rate of return disclosed by the report must have made their accuracy plain to the entire Commission.

(C) CONCLUSION.

In *Rates and Charges on Grain and Grain Products, supra,* the Commission had held that these rates could not be reduced consistently with the requirements of Sec. 15a. It appears from the report of the Commission in the present proceeding that there had been no improvement in the condition of the carriers in the meantime (R. 77).

In that proceeding it had also considered the condition of agriculture and in respect thereof it had said (R. 379):

> "In considering the reasonableness of rates the economic condition of an industry may be relevant as it bears on the value of the service to the industry, and as it may permanently or for a long period of time affect the ability of that industry to pay the rates assessed, but taken by itself it cannot be accepted as controlling."

In that case it had also found after careful consideration that the benefit, if any, to the individual producer would be slight, while the damage done to the railroads would be immediate and severe (R. 400). This finding repeated in substance the conclusions already stated in the report (R. 387) that:

> "The amount that would accrue to the average farmer in the event of an assumed 10 per cent. rate reduction on grain and grain products as indicated by this record is small. [On the previous page it reviews evidence showing that "the saving to the average farmer would range from a few

> dollars to $25 per year"]. On the other hand, as to some of the respondent railroads, the effect of a reduction in rates on grain and grain products to the extent here asked, in addition to what has already been made, would be little, if at all, short of disastrous."

Neither of these findings is reversed. On the contrary, the Commission in the present case found that the effect of a reduction in rates upon the producer would be more or less speculative (R. 93). Something happened in the meantime to cause the Commission to change its mind in respect of situations so similar as related both to the condition of the industry and the carriers. That which intervened was the adoption of the resolution.

In so proceeding it is our contention that the Commission proceeded upon an erroneous conception of its powers and duties under Sec. 15a and failed to discharge the latter (*infra*, p. 87 *et seq.*); and furthermore that the weight accorded to the depressed condition of agriculture as the basis for the lowest possible lawful rates on its products affected thereby is sufficient to render the order void under the decision in *Ann Arbor R. Co.* v. *United States, supra* (*infra*, p. 137 *et seq.*).

Whatever be the legal effect, however, it admits of no doubt from the face of the report that the Commission was proceeding under the resolution, either because it believed that the resolution made it its duty so to do, or out of deference to the wishes and hopes supposed to be expressed by Congress therein.

5. That, in finding existing rates unreasonable to the extent that they exceeded those prescribed, the Commission applied a standard other than that commonly applied in the determination of a maximum reasonable rate appears both from the nature of the action taken and from the report.

(A) THE COMMISSION ITSELF HAD IN OTHER CASES DISTINGUISHED BETWEEN MAXIMUM REASONABLE RATES AND THE LOWEST POSSIBLE LAWFUL RATES REFERRED TO IN THE RESOLUTION. INDEED, TO SAY THAT A RATE MAY AT THE SAME TIME BE THE LOWEST POSSIBLE LAWFUL RATE AND THE MAXIMUM REASONABLE RATE INVOLVES A CONTRADICTION OF TERMS.

In both *Muller & Co.* v. *Pere Marquette,* 151 I. C. C. 787, and *South Carolina Produce Association* v. *Aberdeen R. Co.,* 152 I. C. C. 5, the Commission itself carefully distinguished between a maximum reasonable rate and the lowest possible lawful rates referred to in the resolution. The latter, it said, were lower than the former.

In *South Carolina Produce Association* v. *Aberdeen R. Co., supra,* the Commission prescribed a lower level of rates for the future but refused to award reparation, saying:

> "In view of the fact that the rates which we propose to prescribe will be, in our judgment, the lowest possible lawful rates which may properly be prescribed, under the evidence in this case, such a standard, prescribed for the future, can not be accepted as a standard of reasonable rates in the past. The Hoch-Smith resolution directs us to take into consideration the economic necessities of

> a shipper when fixing a rate structure. Rates made in contemplation of that resolution are less than maximum reasonable rates. This inevitably follows from the provision of the law. A certain zone of reasonableness is created within the limits of which any rates so falling must be considered reasonable. We can prescribe such a basis for the future; but if we have settled upon the measure of such a rate taking into consideration the provisions of the resolution, it is clear that a rate arrived at upon such considerations is not a maximum reasonable one. If such be true, it is unsound automatically to take a rate found reasonable for the future in the light of the Hoch-Smith resolution and prescribe it in the past as a basis for reparation, because to do so would be to award damage down to the basis of a rate which admittedly is lower than a reasonable maximum."

The Commission had thus recognized the distinction between a "lowest possible lawful rate" and a maximum reasonable rate in previous cases. Indeed to say that a given rate may at the same time be the "lowest possible rate" (by whatever standard measured) and the maximum reasonable rate involves a contradiction of terms. It may be one. It cannot be both.

(B) BY MAKING APPROXIMATELY THE SAME PERCENTAGE OF REDUCTION IN RATES APPROVED OR PRESCRIBED AS REASONABLE MAXIMUM RATES UNDER SECTION 1 DURING THE PENDENCY OF THIS PROCEEDING, THAT IS MADE IN THE GENERAL LEVEL OF ALL THE RATES (SUBJECT ONLY TO A RESERVED JURISDICTION, TO BE EXERCISED IN THE PRESENT PROCEEDING, TO DETERMINE WHETHER THEY WERE ALSO THE LOWEST POSSIBLE LAWFUL RATES, REFERRED TO IN THE HOCH-SMITH RESOLUTION).

Among the existing rates approved or prescribed, during the pendency of this proceeding, are the rates from southern Idaho to Pacific Coast ports and to points in the states of California and Arizona as set forth in Appendix D to the report and from points in Utah, Idaho, Montana and Wyoming to points in Colorado (R. 250-1, 247, 272). The former were approved, or prescribed, in *Ogden Grain Exchange* v. *Arizona Eastern R. R. Co.*, 126 I. C. C. 255, 128 I. C. C. 490, 132 I. C. C. 46, and the latter in *Ogden Grain Exchange* v. *Abilene & Southern Ry. Co.*, 122 I. C. C. 691. Both cases were decided during the pendency of this proceeding (R. 23).

At the conclusion of its main report in the first named case (126 I.C.C. 255, 281), the Commission said:

> "It will be understood that our findings herein are limited to the issue of what are or will be the *reasonable maximum rates* on this traffic without regard to the provisions of the Hoch-Smith resolution. We shall leave for determination in the *pending general investigation* the question whether any of these rates *are the lowest possible lawful rates compatible with adequate transportation service.*" (Italics ours.)

The "pending general investigation" refers to the present proceeding.

The order of the Commission reduces the rates in this case approximately 14%.* The report in the other case contains a similar statement of the nature of the action taken and a similar reservation of jurisdiction to be exercised in this proceeding. As in the other case the rates

*This percentage of reduction is calculated from rates shown in the table of present and prescribed rates contained in Appendix D to the Report (R. 244 *et seq.*).

thus fixed are further reduced by this order (R. 24). In these cases, as well as in *Muller* v. *Pere Marquette, supra,* and in *South Carolina Assn.* v. *Aberdeen R. R. Co., supra,* the Commission had recognized, in the jurisdiction reserved, the distinction between a maximum rate and the lowest possible lawful rate. These reductions were obviously made in the exercise of the reserved jurisdiction and for the purpose of substituting the lowest possible lawful rates for the rates previously prescribed as maximum reasonable rates.

(C) IN MATERIALLY REDUCING THE RATES PRESCRIBED, DURING THE PENDENCY OF THIS PROCEEDING, AS MAXIMUM REASONABLE RATES FOR APPLICATION BETWEEN SOUTHERN MISSOURI, ARKANSAS, LOUISIANA AND TEXAS, I.E., THROUGHOUT THE ENTIRE SOUTHWEST.

In a series of cases, decided during the pendency of the present proceeding, the Commission prescribed a mileage scale of reasonable maximum rates for application between Arkansas, Oklahoma, Louisiana, Texas and Southern Missouri, thus embracing the entire Southwest (Report, R. 107, Petition, R. 29). The last of these cases was determined after the close of the record in this proceeding but before rendition of the report. These rates were not only established as maximum reasonable rates but were fitted into the general rate structure by being made in mathematical relationship to the first class rates in the same territory (R. 107). The scale, so prescribed, is materially reduced by the order, the average reduction in the rates on wheat up to a distance of 750

miles, within which the principal movement occurs, being approximately 15% (R. 272).

(D) BY REDUCING THE PROPORTIONAL RATES OUT OF PRIMARY MARKETS.

As appears from the report, the principal movement of grain is through certain cities described in the report as primary markets, such as Kansas City, Omaha, Sioux City, Minneapolis and St. Louis, where a large proportion is stopped for sale, storage or conversion into milled products. Whether so stopped or not the movement from such markets is at so-called proportional or reshipping rates which are lower than the local rates to the same destinations (R. 83 *et seq.*).*

As also appears from the report, these proportional or reshipping rates have been made under the stress of carrier competition, or for purposes of market equalization. The Commission has previously ruled that rates so made do not constitute a measure of reasonable maximum rates under the standards of section 1, since they are lower than would be made except for such competitive and equalizing influences.†

*The character and use of proportional rates is fully set forth in this Court's decision in *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 279 U. S. 768, 771, 777-9. As appears therein, they are based upon a fiction, although a permissible one. As appears from that case, neither the nature nor cost of the service differs materially from that performed under local rates contemporaneously maintained. This alone is sufficient to show that such rates are among the class of so-called "depressed rates", i.e., rates lower than maximum reasonable rates.

†*Carnation Milk Products Co.* v. *Director-General*, 55 I. C. C. 665; *Canned Goods from Colorado, New Mexico, Texas and Wyoming*, 102 I. C. C. 156; *Benson Produce Company* v. *Great Northern Railway Co.*, 113 I. C. C. 541.

Appendix D to the original report (R. 244) prescribes new proportional or reshipping rates, 38 in number. In every case except two the new rates are materially lower than the present proportional rates, as appears from the report of the Commission, have been made by reason of these competitive and equalizing influences. The proportional rates thus prescribed are on an average approximately 70 per cent. of the proportional rates now in effect.

They are on an average approximately 60 per cent. only of the corresponding local rates contemporaneously prescribed by the Commission.

Many of these rates had been hitherto approved or prescribed by the Commission or characterized by it as being depressed, *i.e.*, below normal maximum reasonable rates.*

---

*In *Board of Railroad Commissioners of State of Iowa* v. *Director General*, 63 I. C. C. 405, 410, 412, the Commission characterized the proportional rates from the Missouri River cities as controlled by "carrier competition" and on a basis lower than would be otherwise justified. The Commission nevertheless reduces the rate from Omaha and Kansas City to Chicago from 17½c to 15c and from Kansas City to St. Louis from 13½c to 9c. The proportional rates from Kansas City, Omaha and St. Louis to Memphis, New Orleans, Little Rock, Texarkana and the main commercial centers in Louisiana and Texas are reduced from 12% to 57%, the average being 32%. Of these the present proportional rate of 24 cents from Kansas City to Memphis, approved in *Board of Trade of Kansas City, Mo.* v. *A. & W. Ry. Co.*, 102 I. C. C. 285, is reduced by 33 1/3%. The present rates of 23.5 cents and 26.5 cents from St. Louis and Kansas City, respectively, to Little Rock, prescribed in *Arkansas Manufacturers and Jobbers Association* v. *Director General*, 59 I. C. C. 662, and in *Arkansas Jobbers and Manufacturers Asso.* v. *C. R. I. & P. Ry.*, 80 I. C. C. 620, are reduced to 10 cents, (a reduction of over 50%), and 16 cents, (a reduction of 40%), respectively; the present rate of 23.5 cents from St. Louis to Little Rock is reduced to 10 cents or more than 50% and the present proportional rate of 28.5c from St. Louis to New Orleans, approved by the Commission during the pendency of this proceeding, to 19c.

(E) BY REDUCING AN IMPORTANT PROPORTIONAL RATE PREVIOUSLY PRESCRIBED BY THE COMMISSION AS A MINIMUM RATE.

The present proportional rate of 23.5 cents from St. Louis to Little Rock was prescribed by the Commission as a *minimum*, not as a *maximum* rate. It is reduced to 10 cents, more than 50% (R. 244).

(F) BY REDUCING THE PROPORTIONAL RATE FROM ST. LOUIS TO NEW ORLEANS WHICH THE CARRIERS, DURING THE PENDENCY OF THIS PROCEEDING, WERE AUTHORIZED TO ESTABLISH AND AT THE SAME TIME TO CHARGE HIGHER RATES AT INTERMEDIATE POINTS.

This rate of 28.5 is reduced to 19 cents or 33 1/3%. Permission to establish a lower rate at a more distant point than at an intermediate point may, under the Commission's interpretation of Section 4, be granted only when the former is less than a maximum reasonable rate and the intermediate rates do not exceed maximum reasonable rates (R. 244).

(G) THE ONLY PERMISSIBLE CONCLUSION IS THAT THESE REDUCTIONS WERE MADE AS A PART OF THE PURPOSE, DISCLOSED BY THE REPORT ITSELF, TO PRESCRIBE THE LOWEST POSSIBLE LAWFUL RATES ON AGRICULTURAL PRODUCTS AND NOT FOR THE PURPOSE OF ESTABLISHING REASONABLE RATES AS JUDGED BY THE CUSTOMARY STANDARDS OF THE ACT.

Our purpose in calling the extent of these reductions to the attention of the Court is not to suggest that the

Court should substitute its judgment for that of the Commission in respect of the measure of the rates to be established, but for the purposes stated in the heading. It may be possible that all of the rates, which have been largely approved or prescribed by the Commission in the past had become unreasonable. The Commission likewise has the undoubted power to change its mind, within the standards of the act. It is most unreasonable to suppose, however, that rates prescribed as maximum reasonable rates, subject only to a jurisdiction to determine whether they were also the lowest possible lawful rates, other rates recently prescribed after careful investigation for application throughout the entire Southwest, rates fixed as minimum rates, or rates under which Fourth Section relief was accorded, became overnight rates which exceeded maximum reasonable rates to the extent of the reductions ordered. The only reasonable inference is not that the Commission changed its mind, but that it changed its standards and that it was measuring these rates by a consideration of their relation to "the lowest possible lawful rates" referred to in the resolution.

(H) By the action taken in respect of readjustments made to remove discrimination.

In addition to reducing the general level of the rates, the Commission readjusted the relationship of rates on grain or grain products to each other, where the existing adjustment was found to result in undue discrimination. A large part of the report, other than the appendix dealing with the condition of agriculture, is devoted to a discussion of these situations. Their significance to the

questions now under discussion lies in the extent to which such discrimination was ordered removed by a reduction in one of the offending rates rather than by an advance in the other, or (as is frequently the case) by a reduction in both rates, the reduction in one being greater than the reduction in the other. As pointed out by this Court in *American Express Company* v. *Caldwell, supra*, there may at the same time be two rates, each of which is within the zone of reasonableness, with the result that an existing discrimination growing out of the relation of such rates may be removed either by advancing one or reducing the other. Formerly, where undue discrimination was found, the carrier was permitted at its election to choose which course it should adopt. The Commission now has a right to say, although it may leave that determination to the carrier. If it is done by an advance in one of the offending rates, the carriers' revenues are preserved and increased. If by the other course, they are reduced. The Commission appears to have pursued the policy in this case of requiring that such discrimination be removed by a reduction of those rates which were on the higher level.

One of the major questions involved on this branch of the case concerned the relation between the rates on wheat and flour. In certain parts of the territory these rates were the same, while in others the flour rates exceeded the wheat rates by seven cents. The Commission found that, from the standpoint of relative loadings, values and transportation characteristics, the propriety of equal rates on the two might be questioned. Other considerations of a commercial or economic character indicated the propriety of such equalization. The Commission

found that the rates on the two should be the same (R. 102-3). We are not quarreling with this decision as an exercise of the Commission's administrative jurisdiction. It is significant, however, that it was accomplished by making the wheat rates applicable on flour and at the same time over wide areas reducing the rate on wheat itself. In other words, the Commission required the discrimination to be removed by reducing the higher rate to the lower and then, in turn, reducing the latter. Obviously, it was looking for the lowest possible lawful rate, not for a reasonable maximum.

Of the specific situations dealt with the first relates to the rates from Southeastern Missouri to Cairo, claimed by Cairo to be unduly high as contrasted with the rates from St. Louis, East St. Louis and Memphis. The Commission finds undue prejudice but states that it will be remedied by the rates prescribed (R. 667). Reference to the rates prescribed discloses that the remedy was brought about by materially reducing all of the rates, whether on wheat or coarse grains, to Cairo (Appendix D; R. 258). Many other illustrations could be given.

6. The foregoing conclusions are supported by the concurring opinion of Commissioner Eastman which contains the only extended consideration of the applicable law to be found in the Report.

Commissioner Eastman's concurring opinion contains the only extended discussion of the applicable law to be found in the Report.

This discussion begins as follows:

> "Throughout this proceeding the Hoch-Smith Resolution has been emphasized. In a situation like that which is here presented that resolution makes it our duty to prescribe the 'lowest possible lawful rates compatible with an adequate transportation service'." (R. 168).

The reference to the situation presented is obviously to that presented by the condition of agirculture as reviewed in the Report and as found by the Commission.

The Commissioner then refers to the decision of this Court in *Ann Arbor R. Co.* v. *United States.*

Having done so his opinion then contains an excerpt from a previous report of the Commission (*Grain and Grain Products,* 122 I. C. C. 235, 264) preceding the report in the *Deciduous Fruit* case and which purports to set forth the Commission's interpretation of the Hoch-Smith Resolution and of its effect upon the powers and duties of the Commission. Precisely the same excerpt was contained in the report of the Commission in the *California* case. The substance thereof is contained in the argument submitted to the Court in support of the validity of the order therein set aside.

The substance of the Commissioner's interpretation is that the Commission was, prior to the adoption of the Hoch-Smith Resolution, empowered to make the lowest possible lawful rates, through the exercise of the powers conferred by Sections 1 and 15 (1), and that the effect of the resolution was to direct the Commission to exercise this power in respect of the rates on agricultural products, affected by depression. This is precisely the theory upon which it was sought to sustain the order made in the *Deciduous Fruit* case in the argument to this Court in *Ann Arbor R. Co.* v. *United States.*

While certain portions of this opinion may be regarded as expressing the individual views of the Commissioner, the conclusions may be taken to represent the views of the Commission as a whole, for the following reasons:

1. Although seven other Commissioners filed concurring opinions, and two more concurred in those of others (R. 148 *et seq.*), none dissented from the views expressed by Mr. Eastman.

2. The conception of power and duty therein stated is that stated in *Grain and Grain Products, supra.* This report contains the first interpretation placed upon the Resolution by the Commission. It is that urged upon this Court in *Ann Arbor R. R. Co.* v. *U. S., supra.* It is that which was followed by the Commission in *Muller* v. *Pere Marquette R. Co. and South Carolina Produce Association* v. *Aberdeen R. Co., supra.,* and is one, from which the Commission has apparently never receded, since the power asserted was one, which counsel for the Commission asserted, in the Court below, that it possessed. Commissioner Eastman had dissented in the California case because he believed that the rates established were lower than permissible under the standards of the Interstate Commerce Act. He believed that the Commission had, as the Court said it had, measured the rates by standards supposed to have been created by the resolution instead of by the Act. There never, however, had been any disagreement between Commissioner Eastman and the Commission that the Commission possessed the power asserted, and was directed by the Hoch-Smith Resolution, to exercise it in respect of agricultural products affected by depression, as and in manner stated in *Grain and Grain Products, supra.* The

only point on which they had been in disagreement was in respect of the standard to be used in performing such duty, the Commissioner being of the opinion that the standard used in the subsequent California case was a standard, different than described in *Grain and Grain Products* and lower than legally permissible. The conception of the Commission's powers and duties, as stated in his concurring opinion, therefore, was nothing new. It represented the view of the Commission itself as well as that of Commissioner Eastman. Commissioner Eastman apparently thought that the only effect of the Court's decision was to settle the question upon which he and his associates had previously been in disagreement, *viz.*, the standard by which the lowest possible lawful rates which both he and the Commission considered themselves to be required to make by the resolution. The conception of the Commission's powers and duties stated in the concurring opinion is thus but a reiteration of the Commission's own original interpretation both of its powers and of its duties, as affected by the Resolution.

3. It is not inconsistent with anything contained in the main report. On the contrary it is the only theory consistent with the treatment accorded in the main report to Section 15a and with the only facts which the report contains.

It is believed that the Commission is neither possessed of the power, nor under the duty asserted, but that the order of the Commission is predicated upon the conception of power and duty, set forth by Mr. Eastman, is, we believe, the conclusion which necessarily follows from a consideration of the main report, the concurring opinions and the action taken.

II

IT WAS THE DUTY OF THE COMMISSION TO CONSIDER SEC. 15A.

The Commission in its report recognized the existence of this duty.* Under these circumstances, we should not have supposed that anyone would have denied that such was the duty of the Commission. In the District Court, counsel for the Commission, however, as well as counsel for all other appellees, took the position that it was not the duty of the Commission to give any consideration to Section 15a in this case. The same argument will probably be renewed here.

1. Section 15a must be taken into consideration by the Commission in a case of the character of the Grain case (quite apart from the fact that it is a part of a general rate structure investigation), as the Grain case embraces the general level of all the rates of all the carriers on a major description of traffic in two of the rate groups established by the Commission for the purpose of administering Section 15a.

The argument below was that the Commission is not required to give any consideration to the requirements

*The Commission in its report says (R. 77) that in determining whether there should be a general reduction in the rates, it must take into account, among other things, "whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by law, including Section 15a of the interstate commerce act." While the Commission thus recognized a duty to consider this section it erred in its conception of what that duty was.

of Section 15a in any case, of whatever scope, and however direct a bearing the action taken may have upon the rate of return of *all* of the carriers in one or more of the rate making groups established by the Commission under Section 15a, save only in a proceeding in which all of the rates of such carriers are under review at one time; as for example, in *Increased Rates, 1920,* 58 I. C. C. 220, and *Reduced Rates, 1922,* 68 I. C. C. 676.*

It is not true that the Commission is required to give consideration to Section 15a only in cases wherein the general level of *all* rates is under consideration. It must as clearly give it consideration in any case in which the general level of the rates of all the carriers on any major description of traffic is the question primarily at issue. Such a case is one directly affecting the carriers' revenue and rate of return, as distinguished from one relating primarily to the reasonableness of particular rates.

In the Court below counsel for the appellee relied in support of their contention on the proviso contained in Section 15a and on certain language used by the Court in *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, to support the contrary contention. The proviso reads:

> "* * * *Provided,* That the Commission shall have *reasonable latitude* to modify or adjust *any particular rate* which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country." (Italics ours.)

*In the former case the Commission authorized a horizontal percentage increase in all rates and in the latter case required a horizontal reduction therein (R. 10, 11).

This is not a case dealing with a particular rate or even with particular rates. Aside from the fact that it is a part of a general rate structure investigation embracing all of the rates in the country, this *Part VII* itself deals with hundreds of thousands of rates, embracing *all* of the rates of *all* of the carriers on a major description of traffic in two of the four rate-making groups, into which the Commission divided the United States pursuant to Section 15a and for the sole purpose of administering that section. The action of the Commission thus bears directly, and not merely incidentally, upon the carriers' aggregate net income and rate of return. In the report the general level of the rates, as distinguished from particular rates between particular points, is emphasized as being the main issue (R. 76-7).

The extent to which the Commission may disregard the requirements of Section 15a in cases other than those wherein all of the rates of the carriers are under review in a single proceeding, is moreover specifically limited by the proviso itself to the exercise of *"reasonable latitude"* in the establishment of "any particular rate". This, in itself, is a limitation upon the power of the Commission to disregard Section 15a even when dealing with particular rates. The language of the proviso, so far from supporting the contention that in a case of this description, involving the revenue of all the carriers in the Western District from a major description of traffic, the Commission is not required to give consideration to Section 15a and to the effect of such action upon the revenues of the carriers, supports just the contrary conclusion.

The language relied on in *Dayton-Goose Creek Railway Company* v. *United States*, 263 U. S. 456, is:

> "It should be noted that, in reaching a conclusion, upon this first proposition, we are only considering the general level of rates and their direct bearing upon the net return of the entire group. The statute does not require that the net return from all the rates shall affect the reasonableness of a particular rate or a class of rates. In such an inquiry, the Commission may have regard to the service done, its intrinsic cost, or a comparison of it with other rates, and need not consider the total net return at all" (p. 480).

That case presented but a single question for decision, to wit, the constitutionality of the recapture clause. The extent to which the Commission was relieved, if at all, from giving consideration to Section 15a in any case was not involved, and no determination of that question was necessary to the decision.

The argument addressed to the Court below was made to the Commission in *Rates and Charges on Grain and Grain Products, supra* (R. 341), and was made, as now, in reliance on the foregoing language of the Court in *Dayton-Goose Creek Railway Company* v. *United States, supra.* The Commission referring specifically thereto said:

> "This does not forbid us to consider the net return of the carriers but merely says that we need not when considering a particular rate or class of rates. The matter is for our sound discretion. Nor does it limit or qualify our duty under the above-quoted provision of section 15a. *If the reduction in the particular rate or class*

of rates has no substantial effect upon the aggregate carrier revenue there may be no occasion for considering the latter duty. If, on the other hand, it has a substantial effect upon the aggregate revenue, such occasion arises." (R. 390-1; italics ours.)

The revenue effects of the action taken in this proceeding were direct and substantial. Indeed, the subject matter of the present case is precisely the same as that from which the foregoing excerpt was taken, to wit, the rates on grain and grain products of all of the carriers in both of the rate-making groups involved. The Commission rightly held that in such a case it was its duty to consider the requirements of Section 15a.

It may well be doubted whether, in the excerpt quoted from *Dayton Goose-Creek Ry. Co.* v. *U. S.*, *supra,* the Court intended to say that the Commission was privileged in any case to shut its eyes entirely to the requirements of Sec. 15a, or to do any more than to point out that particular rates might in themselves be unreasonable, even though the carriers' rate of return was inadequate. Certainly it could not have been intended to mean that the Commission could wholly disregard the requirements of Sec. 15a when dealing with the general level of rates on a major description of traffic. Such an interpretation would extend the operation of the proviso beyond the exercise of a reasonable latitude. Indeed, it would result in a complete nullification of Sec. 15a and would permit the Commission by successive reductions in the general level of rates on each of the several major descriptions of traffic to reduce the whole

body of rates to such a point that they would clearly be insufficient to produce the fair return contemplated and require the Commission to retrace its steps by a general advance in all such rates, the carriers in the meantime being prevented by the action of the Commission from realizing as nearly as may be a fair return. That the Court did not by this language intend what is now imputed to it is evidenced by the frequent references to Sec. 15a in *Ann Arbor RR. Co.* v. *United States* involving a much less volume of traffic and in which the revenue effects, although direct, were less in amount.

2. Assuming for the purposes of the argument that the Commission need give consideration to Section 15a only in a case dealing with the general level of all of the rates (and not in a case dealing with the general level of the grain rates), this proceeding is precisely that case, as it is a general investigation into the entire rate structure of the country instituted pursuant to the second paragraph of the Hoch-Smith Resolution, the Grain case being merely a part thereof so designated by the Commission for purposes of convenience.

Assuming the law to be as urged by the appellee below the Commission was, as stated in the report, required to give proper consideration and effect to Section 15a. This proceeding was instituted under the Hoch-Smith Resolution (R. 19, 59, 76), the second paragraph of which requires the Commission to inquire into the rate structure of the country as a whole and to bring it into conformity with all of the mandates of the law including Section 15a.

The present proceeding is merely a subdivision of such general inquiry into *all* of the rates of *all* of the carriers. In the conduct of this general investigation it was as much the duty of the Commission to consider Section 15a, and in reconstructing the rate structure thereunder to take into account its provisions, as though the proceeding were one instituted by the carriers for a general increase in rates. Moreover, the performance of this duty was not left to inference but the Commission was specifically directed in such rate structure investigation to give heed to the provisions of Section 15a as well as to other sections of the Act. By the resolution itself the Commission is directed to give due regard "to the maintenance of an adequate system of transportation". As pointed out by this Court in *Ann Arbor R. Co. v. United States, supra,* at p. 667, Section 15a is the provision made by Congress itself as the means whereby the maintenance of an adequate system of transportation is to be accomplished. As held by the Court in that case, the Hoch-Smith Resolution did not limit or qualify the provisions of Section 15a as written. The fact that the Commission saw fit to subdivide the rate structure investigation into several parts instead of carrying it on as a single proceeding could not, and did not, excuse the Commission from giving consideration to Section 15a in each of such subdivisions, which together constituted a complete and comprehensive inquiry into the rate structure as a whole, which the Commission was directed to make. On counsel's own hypothesis, therefore, the Commission was required in this proceeding to give con-

sideration to the requirements of Section 15a and in so doing to construe that section properly.

3. Since the Commission did give consideration to Section 15a, if it placed a wrong interpretation thereon, its order is void.

But, as appears from the report, the Commission said that it was its duty to give consideration to Section 15a and did give consideration thereto. If in so doing it placed a wrong interpretation thereon, its order is clearly void, because based upon a misconception of its powers and duties. The Court will not, under such circumstances, speculate as to what action the Commission would have taken if it had properly construed the law. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, *Ann Arbor R. Co.* v. *U. S., supra*, *St. Louis & O'Fallon Ry. Co.*, 279 U. S. 461, *United States* v. *N. Y. Central RR. Co.*, 263 U. S. 603, *Florida* v. *United States*, 282 U. S. 194.

III

THE EFFECT OF THE ORDER IS MATERIALLY TO REDUCE THE GENERAL LEVEL OF THE RATES ON A MAJOR DESCRIPTION OF TRAFFIC WITHOUT ANY FINDING THAT THE CARRIERS' RATE OF RETURN WAS, OR IN THE NEAR FUTURE, WOULD BE IN EXCESS OF THAT CONTEMPLATED BY SECTION 15a, BUT, ON THE CONTRARY, AT A TIME WHEN SUCH RATE OF RETURN WAS MATERIALLY BELOW THE STATUTORY REQUIREMENT, AND WITHOUT ANY FINDING, OR BASIS FOR FINDING, THAT SUCH REDUCTION WOULD RESULT IN INCREASED REVENUES THROUGH STIMULATING AN INCREASED VOLUME OF TRAFFIC.

That part of the report in which the financial condition of the carriers is considered and reviewed is as follows (R. 77):

> *"Financial Condition of Carriers in the Western District.*
>
> "The percentage rates of return of Class I carriers in the western district, by regions, for the calendar years 1921-28 were as follows:

	REGIONS			
	Northwestern	Central western	Southwestern	Western District
1921	1.42	4.45	3.17	3.12
1922	2.78	4.07	3.27	3.45
1923	3.45	4.50	3.65	3.96
1924	3.12	4.21	4.34	3.87
1925	3.60	4.41	4.37	4.13
1926	3.83	4.86	4.56	4.45
1927	3.40	4.28	3.98	3.97
1928	4.04	4.59	4.32	4.35

"The above percentages are computed on the investment of the carriers, as shown by their books, including materials and supplies and cash as of the beginning of the year.

"For 10 railroads having 75 per cent or more of their mileage in western trunk-line territory[a] the average rate of return on book value was 2.97 per cent in 1927. In that year also, on the same basis as used in the table above, the returns for individual carriers were 3.66 per cent for the Chicago & North Western, 4.53 per cent for the Chicago, Burlington & Quincy, 4.26 per cent for the Illinois Central, 5.06 per cent for the Atchison, Topeka & Santa Fe system, 4.49 per cent for the Union Pacific system and 3.71 per cent for the Southern Pacific Company. For the years 1921-1927, inclusive, the Oregon-Washington Railroad & Navigation Company earned 1.02 per cent on its book value. The composite earnings of the Great Northern, Northern Pacific, and Minneapolis, St. Paul & Sault Ste. Marie in 1927 yielded 4.75 per cent on our valuation, without considering subsequent investment. During the seven years after the termination of Federal control these roads were short $189,775,069 of making a 5.75 per cent return on property investment and $136,265,151 short of that return on our valuation. In the year 1927 the corresponding shortage was $12,758,736 on our valuation. The Great Northern and Northern Pacific during the 10-year period 1916-1926 added $216,144,016 to their investment, but in 1926 their net railway operating income was $3,394,410 less than for the year ended June 30, 1916, before they made this

[a] "Chicago & Alton; Chicago & North Western; Chicago, St. Paul, Minneapolis & Omaha; Chicago, Burlington & Quincy; Chicago Great Western; Chicago, Milwaukee, St. Paul & Pacific; Minneapolis & St. Louis; Minneapolis, St. Paul & Sault Ste. Marie; Green Bay & Western; Quincy, Omaha & Kansas City."

> additional investment. The foregoing statements were practically undisputed upon this record."

The Commission made no other finding in respect of the carriers' rate of return or financial condition. All of its conclusions in respect thereof were based upon the facts recited in the foregoing excerpt.

In *Rates and Charges on Grain and Grain Products, supra* (R. 341), decided immediately prior to the adoption of the Hoch-Smith Resolution, the Commission found that the carriers' rate of return was less than that contemplated by Section 15a and that the general level of the rates on grain and grain products could not be reduced consistently with the requirements of said section (R. 399-400). As appears from the report, that case was decided primarily upon the results of operation in 1923. As appears from the foregoing table, the carriers' rate of return in that year was 3.96, while in the last year preceding the close of the record in the present proceeding (1927) it was 3.92.

In a special report to the Senate Committee on Interstate Commerce, dated January 21, 1931, the Commission, through its legislative committee, said:

> "The railroads have never been able, since 1920, to obtain the aggregate earnings contemplated by section 15a, and they are faced with continually increasing competition from other forms of transportation" (R. 12).

The Commission, of course, knew this when it made the order.

The average rate of return during the eight-year period covered by the table set forth in the Commission's report was 3.9%.

There is absent from the report any finding that the carriers' rate of return exceeded or was likely in the near future to exceed the statutory standard. On the contrary it affirmatively appears that it was materially less.

In *Kansas Public Utilities Commission* v. *A. T. & S. F. Ry. Co., supra* (R. 327, 336), wherein the general level of the rates on grain and grain products was under review, the Commission found as follows:

> That it was improbable that a reduction in the then existing rates would so increase the movement of grain and grain products as to enable the carriers to make up to any appreciable extent the loss in revenue should a general reduction in these rates be ordered.

In *Rates and Charges on Grain and Grain Products, supra* (R. 341, 399), the Commission made the following specific finding:

> "(g) That we have no assurances on this record that there will be such further increases in tonnage or such reductions in operating expenses in the immediate future as to enable respondents to earn an excess over a fair return. Any further reduction in revenue would increase the shortage in the fair return of carriers in the Western group."

The report in the present proceeding contains no finding that a reduction in the rates would so increase the movement as to enable the carriers to make up to any appreciable extent the loss in revenue resulting from a general reduction. On the contrary, it appears from the report that the Commission in making its order was

fully conscious of the fact that substantial reductions in revenue would result (R. 148).

Moreover, in their petition for rehearing the carriers, after alleging that their traffic and revenue had greatly declined since the close of the record in 1927, alleged and offered to prove that the traffic in grain and grain products was the only major classification of traffic, the volume of which had not declined since the close of the record in 1927 (R. 529).*

The petition for rehearing further alleged that said traffic was moving freely in the same volume as before, and would be nowise increased by the reduction in rates thereon, which would not stimulate the movement of these commodities, the extent of which was determined by production and demand and did not vary with changes in transportation charges (R. 529).

It would, we think, be stretching the presumptions, which attach to an order of the Commission, to hold that in any case reductions of the character herein made, and at the time and under the circumstances made, could be sustained without a specific finding that they would in reality result in stimulating movement and would thus preserve and perhaps increase revenues. Certainly no such presumption may be made where, as in this case, the Commission itself found that the revenue effects would be substantial (R. 148) and that the benefit, if any, which would accrue to the producer would be more or less speculative (R. 93).

---

*This petition alleged, among other things, that while the total number of loaded cars had declined from 18,590,123 in 1927 to 16,997,406 in 1930, the number of cars of grain and grain products in the two years were substantially the same, to wit, 1,577,792 in 1927 and 1,576,091 in 1930.

IV

THE COMMISSION MAY NOT ESTABLISH THE LOWEST POSSIBLE LAWFUL RATES AT A TIME WHEN THE CARRIERS' RATE OF RETURN IS BELOW THE STATUTORY STANDARD. IN SO DOING IT NOT ONLY PROCEEDED UPON A MISCONCEPTION OF ITS POWERS BUT FAILED TO DISCHARGE THE DUTY IMPOSED BY SECTION 15a.

1. Sections 1, 15 and 15a must be read together. Section 15a qualifies and controls the powers which may be exercised under Sections 1 and 15 in any case in which the Commission is required to give the former consideration.

Sec. 1(5) provides that all rates and charges shall be just and reasonable, and that every unreasonable charge is prohibited and declared to be unlawful.

Sec. 15 empowers the Commission to determine and prescribe just and reasonable rates to be thereafter charged in proceedings instituted before it, but *only* after full hearing and *only* if the existing rate is unreasonable and unlawful.

Section 15a (2) provides:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate)

> will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

This section casts an affirmative duty upon the Commission. It requires that it "shall" so establish or adjust rates that the carriers, as a whole, "will" earn a fair rate of return. This duty it is to perform "in the exercise of its power to prescribe just and reasonable rates" (*i.e.*, in the exercise of the powers conferred by Sections 1 and 15). The three sections are thus linked together, and the standard created by Sec. 15a must be read into and becomes a part of the standard created by Sec. 1. In any case in which the Commission is required to give effect to Sec. 15a, that section, in addition to casting an affirmative duty upon the Commission, limits the powers which it might otherwise have exercised under Sec. 1. The extent of such limitation and its application to this case will be discussed later.

2. (a) Prior to the enactment of Sec. 15a the carriers as a whole were permitted to earn a fair return out of the aggregate of the separately established rates, if able to do so.

(b) The purpose and object of Sec. 15a was to insure the receipt of an aggregate revenue by the carriers as a whole sufficient to support an adequate system of transportation.

(c) Congress itself fixed the standard by which such adequacy is to be determined, viz., by the application to the revenues of the carriers as a whole of Amendments V and XIV of the Constitution, limiting the right of public authority to establish rates for a local single product public utility and theretofore applicable to individual carriers only.

(d) For this purpose and as the means of its accomplishment Congress imposed upon the Commission an affirmative duty so to adjust rates as to produce the desired result, as nearly as may be, through the exercise of the powers theretofore conferred by Sections 1 and 15.

As declared by this Court, its enactment marked a new departure in rate making. *Railroad Commission of Wisconsin* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 584-5. That is, it added something to the law as it stood before. See also the *New England Divisions Case*, 261 U. S. 184, 189. What it added, it added by way of the imposition of a new duty upon the Commission, not theretofore resting upon it.

The Fifth and Fourteenth Amendments restrain the Federal and State Governments respectively from imposing upon any public utility, including a railroad, rates insufficient to pay the cost of operation and a fair return upon the value of the property. The rule thus established is simple of application to a local one-product

public utility, customarily enjoying a monopoly. The reasonableness of the rates imposed is to be determined primarily by a consideration of the relation between the resulting net revenue and the value of the property. The practical application of this rule is substantially more difficult in the case of railroads, first, because of their competitive relationship with each other, and second, because the charges made, instead of being for units of like services, are for a multitude of different services performed for a multitude of different commodities in a multitude of different localities, thus bringing into existence the necessity for a distribution of the revenue requirements among the several services performed.

Under the old order of things rates for each of these services were separately determined without regard to revenue requirements as a whole. The aggregate revenues of the carriers were the product of these separately established rates. The statute *permitted* the carriers, as a whole, to earn a fair return from such aggregate revenues but gave no assurance that they would and cast no duty upon the Commission to see that they did.

Moreover, prior to the enactment of Section 15a, there was no standard whereby the adequacy of the revenues of the carriers as a whole, or in any given section of the country, was required to be measured. Theoretically, any railroad was protected against the imposition by public authority of rates, the general level of which, or which taken as a whole, failed to produce a fair return upon the value of its property. As a practical proposition, it could not obtain relief therefrom, however, unless the competing railroads in its own section were in a position to make the same showing. See *Minnesota Rate Cases*, 230 U. S. 352,—in which the state

rates were held to be confiscatory against the Minneapolis & St. Louis, but not as against the Great Northern and Northern Pacific. The result, of course, was that the Minneapolis & St. Louis could not take advantage of its legal right to increase its fares, since the effect of such increase would be to drive the business to its more prosperous competitors. Nor may the Fifth Amendment be taken advantage of by a group of railroads which, as a whole, are receiving less than a fair rate of return. The constitutional protection afforded is limited to the particular person whose rights have been invaded. There was, therefore, no legal standard for the measurement of the adequacy of railroad revenues as a whole.

Congress by Section 15a provided such a standard. In so doing it provided for application to the revenues of the railroads, as a whole, the rule of the Fifth and Fourteenth Amendments as applied to the rates of a single public utility. In so doing it recognized that under such a rule of rate-making—and Section 15a (2) is a rule of rate-making—certain carriers would probably receive more than a fair rate of return. Hence the recapture clause by which any such carrier was required to hold one-half of such excess in trust for the United States. Such, then, was the purpose and object of Section 15a.

In *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585, the Court said:

> "The new measure imposed *an affirmative duty* on the Interstate Commerce Commission *to fix rates* and take other important steps to maintain an adequate railway service for the people of the United States." (Italics ours.)

In the *New England Divisions Case*, 261 U. S. 184, 189, the Court said:

> "Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission, new powers were conferred and new duties were imposed."

To the same effect are: *Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456, 478, and *New York v. United States*, 257 U. S. 591, 602.

The purpose and effect of Section 15a was, therefore, to substitute for the old system of regulation, under which the railroads, as a whole, were permitted to earn a fair return out of the aggregate of separately established rates, if sufficiently high, for the purpose, a new rule of rate-making designed to insure such a return and to impose upon the Commission the affirmative duty so to adjust rates as to accomplish such result.

Although the purpose was to provide for the maintenance of an adequate transportation system, Congress did not leave to the determination of the Commission either the standard by which the attainment of this object was to be achieved, or the means of its attainment. It itself provided the standard by requiring that the rates should be such as to provide, as nearly as might be, a fair return upon the aggregate value of railway property, and the means of its realization by directing the Commission so to adjust the rates. As declared by this Court in *Ann Arbor R. Co.* v. *United States, supra,* Sec. 15a is the provision made by Congress itself as the means provided for the maintenance of an adequate transportation system as a whole. This necessarily excludes any power in the Commission to substitute therefor some other standard or some other means of accomplishing the desired result.

It follows

(1) That Sec. 15a is not a mere permission to earn out of the aggregate rates established a fair return, if possible: It imposes upon the Commission the positive duty to establish such rates as to achieve such result as nearly as may be;

(2) That the rate structure and the level of the rates to be established are to be determined by reference to the required rate of return, not by conclusions of the Commission independently thereof as to what is good for the country or the carriers, or what kind of structure is sufficient for the maintenance of an adequate system of transportation.

3. The Commission may not consistently with the requirements of Sec. 15a prescribe the lowest possible lawful rates in the absence of a finding that the group rate of return received by the carriers exceeds the statutory standard or at a time when it is materially below the same, where the effect of such action is to deprive the carriers *pro tanto* from earning such rate of return.

(A) THE PRESCRIPTION OF THE LOWEST POSSIBLE LAWFUL RATES NECESSARILY PRESUPPOSES THE EXISTENCE OF OTHER POSSIBLE RATES WHICH, IF PRESCRIBED WOULD BE WITHIN THE ZONE OF REASONABLENESS AND HENCE REASONABLE AND LAWFUL UNDER SECTION 1.

To attain the end sought Congress placed upon the Commission the affirmative duty to establish and adjust rates so as to achieve the desired result. The duty imposed is to be performed by the Commission "in the exercise of its power to establish just and reasonable rates". This power had already been conferred by Sec. 1. Prior to the enactment of Sec. 15a it had long been recognized that there was no absolute measure of a reasonable rate but that there was a zone of reasonableness within which any rate might be reasonable and just under Sec. 1. Such fact was recognized by the court in *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624. In the fixing of rates under Sec. 1, considered independently of Sec. 15a there is therefore a certain latitude of judgment to be exercised.

In *Grain and Grain Products, supra,* the Commission, speaking of the phrase "lowest possible lawful rates" referred to in the resolution, said:

> "It sets no new standard of lawfulness, but provides, in effect, that to the extent that there are flexible limits to our discretion, we shall require the maintenance of the *lowest rates falling within those flexible limits.* * * *"

The "lowest possible lawful rates" are thus defined as the "lowest rates falling within the flexible limits of the Commission's discretion". This of necessity means that there are other and higher rates which might, within the limits of such discretion, have been established, and if established, would have been reasonable and lawful.

The effect of Sec. 15a is to require the Commission so to exercise this discretion. Otherwise the requirement of Sec. 15a that the Commission shall so exercise its powers under the earlier sections as to produce such result, is meaningless. Particularly does such duty arise in a general inquiry, such as this, into the rate structure as a whole, which has for its purpose the bringing of the same into harmony with all the standards of the Act, including that of Sec. 15a. Obviously the duty so imposed excludes the power to establish rates at the lower boundary of the zone of reasonableness (*i.e.*, to establish the lowest possible lawful rates) where the effect of such action is to prevent the carriers from receiving the rate of return contemplated.

In *Ann Arbor R. Co.* v. *United States*, 281 U. S., at page 661, the Commission, in its argument, referring to the phrase, the "lowest possible lawful rate" contained in the Hoch-Smith Resolution, said:

> "The resolution recognizes, both as a legal and factual possibility, that there may be a lowest possible lawful rate and, conversely and necessarily, a highest possible lawful rate."

The establishment of the "lowest possible lawful rates" thus necessarily presupposes, as evidenced by the argument of the Commission in that case, the existence of other and higher figures, within the zone of reasonableness, which, if established, would satisfy the requirements of Sec. 1 that all rates shall be just and reasonable.

(B) THE PRESCRIPTION OF SUCH RATES AT SUCH A TIME RESULTS IN THE MAKING OF RATES LOWER THAN ARE NECESSARY TO MEET THE REQUIREMENTS OF SEC. 1 AND PRO TANTO PREVENTS THE CARRIERS FROM RECEIVING AS NEARLY AS MAY BE A FAIR RETURN.

There is thus inherent in any assertion of power to establish the "lowest possible lawful rates" an assumption of the power to prescribe a rate lower than necessary to meet the requirements of Sec. 1. The necessary effect of such action at a time when the carriers' rate of return is inadequate under Sec. 15a is to deprive the carrier *pro tanto* of the opportunity to earn such fair return "as nearly as may be", however these words may be construed. Rates established as "the lowest possible lawful rates" are of necessity lower than might have been fixed and yet have been within the zone of reasonableness and hence reasonable and lawful under Sec. 1. The argument of the Commission in the *Ann Arbor* case that there might be a figure representing the highest possible lawful rate and a different figure representing the lowest possible lawful rate establishes this beyond question.

That such is the effect may be illustrated by a consideration of the action taken in *Muller* v. *Pere Marquette R. R. Co., supra.* In that case the Commission reduced

the rate on chicory from 44¢ to 29¢. It found that chicory was an agricultural product affected by depression. It found that the existing rate of 44¢ did not exceed a maximum reasonable rate but exceeded the "lowest possible lawful rate" which it found to be 29¢. The lower boundary of the zone of reasonableness was therefore in that case not higher than 29¢ and the upper boundary not lower than 44¢. Within these limits any rate might be reasonable and lawful under the standards of Sec. 1, considered independently of Sec. 15a. If, in the exercise of the powers conferred by Sections 1 and 15, all rates were established on such a basis, it is self-evident that the carriers could never achieve a fair rate of return. It is equally plain that when the carriers' rate of return is inadequate, action such as was taken in the *Muller* case *pro tanto* deprives the carriers of the opportunity to earn such a rate of return, as nearly as may be, by prescribing rates lower than necessary to keep them within the zone and hence satisfy the requirements of a reasonable rate under Section 1.

(C) THE FUNDAMENTAL ERROR OF THE COMMISSION LAY IN ITS FAILURE TO RECOGNIZE THAT IN A PROCEEDING IN WHICH THE COMMISSION WAS REQUIRED TO CONSIDER SECTION 15A THAT SECTION REQUIRED THE COMMISSION TO EXERCISE THE POWERS THERETOFORE CONFERRED BY SECTIONS 1 AND 15, TO DETERMINE THE POINTS IN THE ZONE OF REASONABLENESS AT WHICH RATES SHOULD BE ESTABLISHED, SO AS TO PRODUCE, OUT OF THE AGGREGATE OF ALL SUCH RATES, A FAIR RATE OF RETURN, AS NEARLY AS MAY BE. OTHERWISE, THAT SECTION IS RENDERED MEANINGLESS.

It is a matter of common knowledge that the tendency of a railroad or other other public utility is to make the rates as high as traffic will bear. On the other hand, the tendency of public authority is to make them as low as possible. Sections 1 and 15 impose a restraint upon the power of the carrier in the pursuit of the former tendency to exact an unreasonable or exorbitant charge. Section 15a does not afford it any new license so to do or prohibit the Commission from reducing such a rate even though the carriers' returns may be inadequate. On the other hand, Sec. 15a is obviously intended as a curb upon the tendency on the part of public authority to "make the lowest possible lawful rates", insofar as such restraint is necessary to produce out of the aggregate rates established the required rate of return. Clearly this result could not be achieved if all rates were fixed at the lowest possible lawful level under the standards of Sec. 1.

In *Grain and Grain Products, supra,* 264, the Commission defined the lowest rate which could be made within the flexible limits of its discretion as one "high enough to cover all the cost that may be fairly allocated to the service plus at least some margin of profit." In his concurring opinion in the present proceeding Commissioner Eastman accepted this definition with the qualification that "for the sake of clarity we should have used the words 'some substantial margin of profit' " (R. 169).

For the sake of the argument, either definition may be accepted as the "lowest rate falling within the flexible limits" of the Commission's discretion. In either case there is necessarily a higher rate which might have been made and if made would have been within such limits.

In either case the margin of profit allowed, through the exercise of this discretion, directly affects the carriers' rate of return. It is out of the margins of profit allowed in the aggregate of the rates, thus separately established, that the rate of return accrues.

Each of the definitions stated obviously has reference to powers which the Commission is assumed to possess under Sections 1 and 15, *viz.*, to exercise its discretion, to determine the margin of profit to be realized out of the several separately established rates to be fixed. It is exactly that discretion which Section 15a requires be exercised, so as to produce, as nearly as may be, a fair return out of all of the rates thus separately established. Under such circumstances, the Commission may not make the lowest rates falling within the limits of such discretion where the effect is to prevent the accomplishment of the purpose stated. Otherwise Sec. 15a is meaningless. We doubt whether the Commission could exercise this discretion, without Sec. 15a, without taking into account its effect upon the adequacy of the carriers' revenues. Certainly it may not do so under 15a without taking into account the adequacy of such revenues as measured by the standards of Sec. 15a, for which it may not substitute some other. The duty imposed and the manner in which it is to be exercised exclude the right to substitute for the existing rates, whether already reasonable or unreasonably high, the lowest possible lawful rates, thus preventing the carriers *pro tanto* from receiving out of rates in themselves reasonable because in the zone of reasonableness, the fair rate of return which the statute contemplates. At such a time, or in the

absence of a specific finding that the carriers' rate of return exceeds, or is likely in the near future to exceed, the statutory rate of return, the Commission may not establish the lowest possible lawful rates, whatever power it may have to do so when the statutory rate of return is exceeded, or might have had prior to the enactment of Section 15a.

In *Reduced Rates, 1922,* 68 I. C. C. 676, and again in the recent *Fifteen Per Cent. Case, 1931* (*Ex parte 103*), 178 I. C. C. 539, the Commission pointed out that an advance in rates did not necessarily mean an increase in revenue and that a decrease in rates might increase revenue through increasing movement. Clearly, however, the Commission may not reduce rates on a substantial volume of traffic, at such a time and for such a reason, at a time when the rate of return is inadequate, in the absence of a specific finding that the effect of such reductions will be so to stimulate the movement of traffic as to at least preserve, if not increase, the net revenues of the carriers. While it is not our purpose in this part of the brief to deal with the facts, it is appropriate to point out the absence of any such finding in this case as the reason for failing to pursue further the argument in respect of this question.

4. Recapitulation of the true import of Section 15a and of its relation to the powers of the Commission under other sections of the Act.

It follows from the foregoing:

(1) Sec. 15a is not a mere permission to earn out of the aggregate of rates established a fair

return, if possible. It imposes upon the Commission the positive duty to establish such rates as to achieve such result as nearly as may be.

(2) The rate structure and the level of the rates to be established are to be determined by reference to the required rate of return, not by conclusions of the Commission independently thereof as to what is good for the country or the carriers, or what kind of a structure, in its opinion, is necessary for the maintenance of an adequate system of transportaiton.

(3) Sec. 15a becomes a part of the standards of Sec. 1, which must be read and applied with respect thereto. Sec. 15a therefore limits the Commission in the exercise of the powers theretofore conferred by Sec. 1 to the extent necessary for the achievement of the purpose of the former.

(4) Sec. 15a does not prohibit the Commission from reducing particular rates or classes of rates when clearly unreasonable, i.e., above the upper boundary of the zone of reasonableness. It does forbid the Commission, (in a case where the existing rates are above the upper boundary of the zone of reasonableness, just as much as in a case where the existing rates are within the zone of reasonableness), either to fix *all* rates at the lowest possible lawful level, thus preventing *all* possibility of achieving the statutory rate of return, or to fix the rates of any major description of traffic at the lowest possible lawful level, where

the effect is *pro tanto* to prevent the receipt of such return. The Commission may not, therefore, establish the lowest possible lawful rates on a substantial volume of traffic, where the carriers' rate of return is at the time inadequate, or in the absence of a specific finding that it exceeds or in the near future will exceed the statutory rate.

(5) The Commission may not establish the lowest possible lawful rates on a substantial volume of traffic upon the theory that such reductions will increase revenues by increasing movement, without a specific finding to that effect.

For the reasons hitherto set forth, the Commission may not consistently with the requirements of Section 15a establish the lowest possible lawful rates on a large volume of traffic affecting all the carriers in a given rate making group in the absence of a finding that the carriers' rate of return exceeded or was likely to exceed the statutory standard or at a time when it was below that standard. In this case the Commission did not make the former finding and it appears from the report that the carriers' rate of return was materially below that contemplated by Section 15a (R. 77). In thus establishing the lowest possible lawful rates, the Commission deprived the carriers of the opportunity to earn, as nearly as might be, out of rates themselves within the zone of reasonableness, the fair return thus contemplated. In so doing it not only failed to give proper consideration and effect to Section 15a but committed an affirmative breach of its duty thereunder. The duty imposed

by that section is a continuing duty. Of all of the positive duties imposed upon the Commission, it is the most important. The section by which that duty is imposed is the keystone of the existing system of railroad regulation.

Assuming that we are wrong, however, in all of the foregoing conclusions, it would seem clear that the Commission may not establish the lowest possible rates under the conditions recited, solely by reason of the existence of depression in the industry affected. It would seem equally plain that it could not do so in this case if its action was based either upon the assumption that the resolution made it its duty so to do, or if done out of deference to the supposed wishes of Congress, although not amounting to a command.

Since if its action, although otherwise within its powers, was violative of other provisions of the Act, as well as 15a, if based upon any of the three considerations stated, discussion of this question will be postponed until later.

5. The rates prescribed were prescribed as the lowest possible lawful rates.

Commissioner Meyer, whom the report shows to have been the Commissioner in immediate charge of the proceeding, said:

> "The rates prescribed lie within the zone of reasonableness, but they are the lowest rates on this traffic which can be lawfully prescribed" (R. 150).

Later on, answering the demand of certain interests for reduction in the export rates, the Commissioner says:

> "* * * But even if they had produced the desired effect we would still be without power to compel the railroads to publish them unless the rates fell within the zone of reasonableness. It is my understanding that many of these rates were established on a level below that zone. Whatever the facts may be in this regard, we are establishing herein rates as low as we can lawfully prescribe. * * *" (R. 153).

Commissioner Meyer thus twice characterized the rates prescribed as the lowest possible lawful rates. As the Commissioner in immediate charge of the case, and under whose jurisdiction the report was presumably prepared, Commissioner Meyer's statement must be taken to be properly descriptive of the nature and purpose of the action taken. They were so referred to by Commissioner Eastman as the rates which the Commission was "required" to make. That they were of the character stated is further evidenced by the doubts expressed by Commissioners Lewis and Woodlock as to whether they were sufficiently high to be permanent (R. 186, 187).

Neither the report itself nor the concurring opinion of any other commissioner asserts to the contrary. The court may consider either dissenting, or concurring opinions, for the purpose of determining the nature and basis of the Commission's action, particularly where there is nothing in the main report to the contrary. *Southern Pacific Co.* v. *United States*, 219 U. S. 433, 449; *St. Louis & O'Fallon Ry. Co.* v. *United States*, 279 U. S. 461, 485-486.

That they were properly so characterized is shown by the report as a whole and the severity of the reduction made (*ante* pp. 37, *et seq.*).

6. The action of the Commission may not be sustained by a reference to the phrase "as nearly as may be" which Sec. 15a contains.

It may be said, as was said below, that the expression "as nearly as may be" qualifies the duty imposed. It is believed that this phrase was inserted solely in recognition of the fact that the statutory rate of return could not be achieved with mathematical accuracy. Certainly it extends to the Commission no license to prescribe rates which will yield but a fraction of the percentage of return fixed by the Commission itself as the fair rate of return required by the Act to achieve its purpose. Assuming without conceding that this phrase was inserted also in recognition of the possibility that commercial conditions would render receipt of the full rate of return impossible, even this interpretation may not be successfully invoked in support of the order. The grain traffic moved freely under the existing rates. There was no practical obstacle to the retention of the existing revenues arising therefrom. Assuming, without conceding, that some of the rates were above the upper boundary of the zone of reasonableness or even that the general level was above such boundary, there was no justification in substituting for such rates the lowest possible lawful rates. The necessary effect was to establish rates lower than required to meet the requirements of a reason-

able and lawful rate and hence to deprive the carriers *pro tanto* of realizing as nearly as might be the statutory rate of return. To establish such rates is not to enable the carriers to earn such fair rate of return, "as nearly as may be", but to deprive them of the opportunity so to do.

7. The order of the Commission would have been void, if it had contained, which it did not, a specific finding that the rates were unfairly related to the rates on other traffic.

The Commission at the inception of its report stated that among the questions to be determined was whether the rates were properly related to the rates on other traffic (R. 77). In its previous decision, determined immediately prior to the adoption of the Hoch-Smith Resolution, it had held that they were (R. 399). The report in the present proceeding makes no finding to the contrary and contains no recitals of fact upon which such a finding could be based. Had it done so, the order of the Commission would still have been in disregard of the duties of the Commission under Section 15a, unless accompanied by a further finding that the rates on grain and grain products were so high as to cast an undue burden on the grain traffic as contrasted with other traffic *under a rate structure sufficient to yield a fair rate of return out of all traffic.* This proceeding was but part of a general investigation into the rate structure as a whole for the purpose of bringing the same into conformity with all provisions of the Act (R. 45). The carriers' rate of return was materially less than that required by Section 15a (R. 77). In order to bring the rate

structure as a whole into conformity with all provisions of the Act, it was therefore the duty of the Commission, in such general investigation, to adjust the same so as to produce, out of all the rates, the required rate of return. A finding, if made, that the grain traffic was contributing more than its fair share of the existing, but inadequate, revenues of the carriers would not have justified a reduction in the rates, or the establishment of the lowest possible lawful rates. The Commission would have been required to go farther and to find that, under the existing rates, the grain traffic was contributing more than its proper proportion of the revenues of the carrier under a rate structure which would produce a fair rate of return.

If, for example, the general level of the rates on grain was found to be the same as that on some other description of traffic moving in substantially the same volume, and if the Commission had specifically found that the rates on grain traffic, considered from the standpoint of the cost and value of the service, should be 10% less than on the other, and if, at the same time, it appeared that the carriers' gross revenues were insufficient by 10% to produce the fair return contemplated by Sec. 15a, the Commission obviously would not have been justified in requiring a reduction in the grain rates. Under such a state of facts the grain traffic would be contributing exactly that proportion of an adequate carrier revenue which it should produce.

The grain shipper is not interested in the relation between his rate and the rates paid on iron and steel articles as such, but only in the question as to whether he is contributing in a greater degree than he should to the support of the railroads. Whether he is or not must be

determined by the relation of his contribution to an adequate, not to a presently existing inadequate revenue when measured by Sec. 15a. He may have a direct interest in the relation between his rates and the rates on commodities, if any, with which he competes. Despite the inadequacy of existing revenues, the Commission may require a readjustment of one or the other in order to remove the resulting injury to the grain shipper. In such a case, however, if the grain traffic were not contributing more than its fair share to a proper aggregate revenue, it would appear to be the duty of the Commission to correct the existing discrimination by requiring an advance in the rates of those competing articles of commerce, which were contributing less than their fair share thereto.

A mere finding that the grain traffic's present contribution to the existing but inadequate revenues was proportionately larger than it should be, would not, if made, have warranted the Commission in reducing the rates, unless it was also prepared to find and did find that the grain traffic's contribution to existing revenues was larger than it should be called upon to contribute under a rate structure which would produce an adequate return. Otherwise the Commission, by measuring the relativity of such contribution and of the resulting burdens by the standard of an existing inadequate revenue, would be in the position of constantly diminishing both the rate of return and the opportunity to earn a fair return by the application of the wrong remedy. Under such circumstances the duty of the Commission to require an increase on the traffic which is not contributing its proper proportion of an adequate revenue is plain.

The existence of this duty the Commission clearly failed to perceive. Indeed, we believe that to a considerable degree the present inadequacy of the carriers' revenues is due to the failure of the Commission and perhaps of the carriers, as well, to recognize this self-evident proposition. Both the carriers and the Commission had become so accustomed, prior to the enactment of Sec. 15a to consider the *existing* relationship between rates on various descriptions of traffic, whether aggregate revenues were adequate or inadequate, that they both overlooked the true relation of Sec. 15a to such a case. The result is, as we believe, that many rates have been reduced by order of the Commission by reason of the relationship thereof to the rates on some other description of traffic without taking into account that such relationship, under Sec. 15a, afforded no proper measure of reasonableness, when the aggregate revenues from all traffic were inadequate. It might afford a basis for an order to remove discrimination between competing commodities but certainly it could not be employed for the other purpose.

In any event, since the Commission did not find that the grain traffic was contributing more than its fair proportion even of the existing inadequate revenues, it is unnecessary to pursue the subject further. For the reasons stated, we think it plain that such a finding, had it been made, would have been insufficient to sustain the order, unless coupled with the further finding that it was contributing more than its proper proportion of an adequate revenue. The report contains no such finding and no recital of facts which would have supported such a finding, if made.

V

THE COMMISSION'S MISCONSTRUCTION OF SECTION 15a AND OF THE EFFECT OF THE RESOLUTION UPON ITS DUTIES THEREUNDER APPEARS ON THE FACE OF THE REPORT.

1. The Commission either (a) erroneously construed Section 15a as being merely permissive and as permitting the Commission to substitute a standard of its own for the statutory standard established thereby, or (b) construed the resolution as discharging it in the proceeding before it from the the affirmative duty to impose generally by Section 15a.

At the inception of the report the Commission thus states the question presented:

"THE QUESTION OF A GENERAL RATE REDUCTION

"The question here presented is whether, under present conditions, the rates on grain and grain products throughout the western district are reasonable and just and are properly related to each other and to the rates on other traffic. The answer must take into account not only comparisons of distance, transportation conditions, and ton-mile and car-mile earnings on grain and other commodities, *but also whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by law, including section 15a of the interstate commerce act, which we construe to permit, but not to guarantee, the carriers to earn 5.75 per cent on the fair value of the property devoted to*

the transportation service" (R. 77). (Italics ours.)

Section 15a while not a guaranty is more than a permission. It casts upon the Commission an affirmative duty to adjust and establish rates conformable thereto. The permissive right to earn a fair rate of return existed prior to its enactment. If the Commission's language is to be taken literally, it evinces a clear misconception of the general purpose of Section 15a and its relations with other provisions of the Act.

If the Commission meant to say that in this case as contrasted with one involving all rates, the section was permissive only in its effect because the Commission had been discharged by the Resolution from giving effect thereto in fixing the rates on agricultural products affected by depression, its position is equally untenable. The Resolution made no change in the basic law and did not discharge the Commission from the performance of any duty which prior to its enactment it was required to perform.

This proceeding was merely a part of a general inquiry into the entire rate structure in which it was the duty, among others, of the Commission to protect, preserve, and, if possible, increase the net revenues of the carriers, since they were already far below the standard prescribed. This duty rested upon the Commission in every part of this proceeding. Instead of recognizing the true relation of Section 15a to the general rate structure investigation and to every part of it, the Commission apparently proceeded upon the theory that the rates on the several descriptions of traffic involved in each of its

numerous subdivisions were to be independently considered, the net revenues of the carriers thus becoming whatever they might become under the aggregate of the rates thus established. The Commission in fact, as well as in words, thus construed Section 15a as merely permitting the carriers to earn a fair return, out of the rates then established, if they could get it, instead of making it the duty of the Commission to establish rates which would produce such return as nearly as might be, even though it may have been conscious, as were Commissioners Eastman, Lewis and Woodlock, that the resulting structure might have to be immediately revised again in order to meet the requirements of Section 15a (R. 186, 187). The case was an important one directly and materially affecting the aggregate revenues of the carriers, as well as being a part of a general inquiry into the entire rate structure. The language used was presumably advisedly chosen. That in such a proceeding the Commission could dismiss so cavalierly Sec. 15a and its meaning is sufficient to show that the Commission wholly misunderstood the effect of the duties imposed upon it by Section 15a on the issues presented.

At the conclusion of its report under the heading "General Comment", the Commission says:

> "The action here taken represents the fullest possible response to all the mandates of the law affecting, among other things, the important subjects of levels and relations of rates, the natural and proper development of the country as a whole, and the maintenance of an adequate system of transportation. The future volume of movement of wheat and other grains between specific points

> can not be accurately known. It follows that the revenue effects of the increases and decreases which will follow the effectiveness of our action herein cannot be precisely stated. We have made many different checks and estimates. *While the reductions far exceed the increases, and the corresponding revenue effects will be substantial,* the full effect upon revenues cannot be adequately foretold, in view of the limitations upon transit, the elimination of transit balances outbound from primary markets, and the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates. *We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation"* (R. 147). (Italics ours.)

Similar language appears in the Commission's report in *California Growers' & Shippers' Protective League* v. *S. P. Co.*, 129 I. C. C. 25, 55, the order in which was set aside in *Ann Arbor R. Co.* v. *United States, supra.* In that report the Commission said:

> "* * * While all the defendants who handle the bulk of the deciduous-fruit traffic have not as yet made the fair return, their present financial condition is relatively strong. It seems clear that the reduction requested, if granted, would not affect the maintenance of adequate transportation service."

The words "the maintenance of an adequate system of transportation" employed by the Commission in both cases were lifted bodily from the third paragraph of the Hoch-Smith Resolution which reads:

> "In view of the existing depression in agriculture, the commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service * * *."

In setting aside the order of the Commission the Supreme Court said (281 U. S., at pp. 667-668):

> "The third paragraph was construed by the commission as making a change 'in the basic law,' as placing agricultural products in a 'most favored' class, and as justifying a reduction in the rates on deciduous fruits moving from California to eastern points, notwithstanding most of the carriers 'have not as yet made the fair return' *for which § 15a of the Interstate Commerce Act makes provision as a means of securing the maintenance of an adequate transportation system.*" (Italics ours.)

In this case as in that case the Commission was thus proceeding on the erroneous assumption that it was empowered, if not directed, to reduce the rates on agricultural products affected by the depression, notwithstanding, as appears from the report in this case and as was stated in the report in that case, that the carriers' rate of return was below that contemplated by Section 15a, provided only the Commission was of the opinion that the reductions required would not threaten the maintenance of an adequate system of transportation.

Among the mandates to which the order is said to be fully responsive is that requiring "the maintenance of an adequate transportation system". The order is said to be fully responsive to that mandate because, although the revenue effects will be substantial, the Commission is "satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation". In so stating the Commission could not have intended to say that the action taken was fully responsive to the mandate imposed by Sec. 15a, adopted by Congress as the means by which the maintenance of an adequate system of transportation was to be insured, since it appeared from the report that the carriers' rate of return was already far below the standard of that section.

If the language employed was intended to be descriptive of the Commission's interpretation of the general mandate imposed by Section 15a, it clearly erred. This error lay in failing to perceive what is made clear by the foregoing excerpt from the opinion of the Court, namely, the distinction between the maintenance of an adequate system of transportation, as the *end* sought to be attained by Section 15a, and the provision made therein by Congress itself as the *means* by which such end was to be attained.

The effect of such an interpretation would be wrongfully to substitute for the Congressional standard and the Congressional means of its attainment others of the Commission's own creation (*supra*, p. 88 *et seq.*) The only permissible alternative is that the Commission proceeded upon the assumption that, in respect of the establishment of rates on agricultural products affected

by depression, it was relieved of its duty to consider and give effect to the requirements of Section 15a, if, merely, it was of the opinion that the readjustment ordered would not affect the maintenance of an adequate transportation system. The only possible basis for this explanation is the third paragraph of the Hoch-Smith Resolution. But the Hoch-Smith Resolution made no change in the basic law. *Ann Arbor R. Co.* v. *U. S., supra.* It therefore did not discharge the Commission from the duty to give effect to the requirements of Sec. 15a in any case in which it was required to give the same effect prior to the adoption of the resolution, as the Commission itself had done in its previous report in respect of the same subject matter prior to such adoption. The reference in the foregoing excerpt, from the opinion of this Court in *Ann Arbor R. Co.* v. *United States, supra,* to Sec. 15a, moreover, makes it plain that among the provisions of the Act, to which the Commission must give proper effect in establishing the rates on agricultural products, although affected by depression, is Sec. 15a. The adoption of the Resolution did not, as had been erroneously assumed by the Commission, establish such agriculture as a favored class, freed from the application of any part of the basic law governing generally the determination of rates, or the powers and duties of the Commission. Either interpretation of the Commission's language is equally fatal to the validity of the order.

The second of the two permissible explanations is the most likely. The review hitherto made of the report as a whole and of the action of the Commission (pp. 37 *et seq. ante*) makes it plain that the Commission proceeded

upon the theory that by reason of the Hoch-Smith Resolution it was its duty to establish the lowest possible lawful rates on the products in question, irrespective of their effect upon the carriers' rate of return. This theory, implicit in the foregoing excerpt from the main report (*infra*, p. 140, *et seq.*), is given explicit expression in the concurring opinion of Commissioner Eastman, who said:

> "Throughout this proceeding the Hoch-Smith Resolution has been emphasized. In a situation like that which is here presented, that resolution makes it our duty to prescribe the 'lowest possible lawful rates compatible with the maintenance of adequate transportation service.'" (R. 168).

The reference in the main report to the "maintenance of adequate transportation service" as among the mandates of the law, and the statement (R. 147) that such mandate had been fully complied with because the Commission was satisfied that the readjustment would not threaten the maintenance of such a system, is but another way of expressing the conclusion stated by Mr. Eastman. None of the seven other Commisioners filing concurring opinions, dissented from the view thus expressed (R. 148 *et seq.*).

2. The Commission, if it did not wholly misconceive its duties under Sec. 15a, proceeded upon the erroneous assumption that, because of the resolution, it was directed to establish the lowest possible lawful rates in this proceeding, although at or after the conclusion of the general investigation, of which it was a part, it might be required to advance the general level of all rates, including grain rates, in order to discharge the duty imposed by Sec. 15a.

Commissioner Eastman, after declaring it to be the duty of the Commission under the resolution to establish the lowest possible lawful rates *in the present proceeding* (R. 168), recognizes the fact that, unless other sources of increased revenue could be found in other parts of the proceeding, the Commission might be required to increase the rates on grain and grain products now reduced in order to comply with Section 15a (R. 172). This is equivalent to saying that, *because of the resolution*, the Commission was discharged from giving effect to Section 15a *in this proceeding*, whatever the effect of the action taken thereon and, although but for the resolution it would have been required to do so *now*.

Commissioner Lewis expressed the opinion "that the level herein prescribed is probably too low to be permanent" (R. 186).

Commissioner Woodlock was gravely apprehensive of the revenue effects of the order and expressed the opinion that if the rates prescribed were "to remain long in effect * * * they will produce a situation which will require emergency remedies if we are to maintain in

that territory an adequate system of transportation" (R. 187).

It is stated in the main report that the revenue losses would be substantial (R. 148). It appears from the report that the existing rate of return was grossly inadequate. It must, therefore, have been plain to the whole Commission, as well as to the three Commissioners named, that to meet the requirements of Section 15a, the rates prescribed would probably have to be advanced in the future. In fact, the main report itself refers to such a possibility by saying that the action taken was taken "in the realization that a failure of the present revision to afford adequate revenue will prompt further proceedings" (R. 148).

If the existing rate of return had been adequate or nearly so, there might have been some excuse for such a course. Under the circumstances, it was based upon the belief that in the present proceeding the Commission was under a mandate, supposed to have been created by the Resolution, to prescribe the lowest possible lawful rates on agricultural products affected by depression, irrespective of the existing inadequacy of the rate of return, and to postpone giving effect to the express mandate of Section 15a until a later time.

Instead of awaiting such conclusion, the Commission proceeds to reduce the rates to the lowest possible lawful basis, and thus deprive the carriers *pro tanto* of an opportunity to earn the statutory rate of return. The Commission may not thus play fast and loose with the carriers' revenues. If, after the conclusion of the general investigation as a whole, the Commission was in a posi-

tion to find that the readjustments made therein would produce a rate of return in excess of the statutory standing, it might conceivably at that time have readjusted the rates on certain descriptions of traffic, including grain. Clearly it was without authority to establish the lowest possible lawful rates upon a mere hope that, despite the resulting reductions in revenue, the carriers, through the future adjustment of some other rates, not then determined or capable of being known, might, achieve the fair return which was then lacking.

The soundness of the conclusions stated may be tested by considering the effect, if the Commission had proceeded, in each of the several parts of the general investigation, to establish the lowest possible lawful rates on each description of traffic as they came under review. The obvious result would be that, at the conclusion of the investigation as a whole, the carriers' revenues would have been inadequate to meet the requirements of Section 15a and the Commission would have been required immediately to advance the general level of all the rates thus established. This it would have been required to do, either by a horizontal advance in all, or through another additional protracted investigation, conducted for the purpose of determining how the increased revenue required should be distributed among the several descriptions of traffic. The latter course, if undertaken, without doubt would require several years to complete.

In the meantime, the carriers would be prevented from any opportunity to earn the contemplated rate of return by reason of the action taken by the Commission. This effect would be brought about by action of the Commission in ignoring Sec. 15a throughout the general in

vestigation. But if it was permitted to ignore it in one part thereof, it was permitted to ignore it in all parts. Such could not have been the view of the Commission either of its powers or of its duty. The only other explanation is that it believed itself to be required by the resolution, as it had previously said it was, and as Commissioner Eastman in his concurring opinion said it was, to ignore Sec. 15a in establishing the rates on agricultural products provided *only* it was of the opinion that the reductions made would not immediately threaten the maintenance of an adequate system of transportation. The resolution had no such effect.

Moreover, the foregoing statement of the effect, if the Commission had proceeded similarly in all other parts of the general investigation, should be sufficient in itself to establish the error of the Commission's contention that it is, at all times, empowered, under the Interstate Commerce Act, to establish "the lowest possible rates" on any description of traffic, irrespective of the adequacy or inadequacy of the existing rate of return, or of the effect of the action taken thereon.

This proceeding was but a part of a general investigation into the rate structure as a whole (R. 45, 69). This investigation was instituted by the Commission pursuant to the second paragraph of the Hoch-Smith Resolution (R. 76). The purpose of this investigation was to bring the rate structure as a whole, so far as possible, into conformity with all provisions of the Interstate Commerce Act. To borrow an expression from the Commission's report, the Commission was required therein to respond to all of its mandates. Among those mandates is that contained in Section 15a (R. 77). It was therefore the duty of the Commis-

sion in this proceeding to consider the rate structure as a whole in relation to the requirements of that section and to provide at its termination, so far as might be, a rate structure which would yield the rate of return contemplated by such section. No general investigation into the rate structure as a whole, which falls short of accomplishing this purpose, is responsive to the requirements of the Act or the duties of the Commission.

The duty thus imposed rested upon the Commission in all parts of the proceeding. The Resolution did not discharge it from such duty.

The Commission was without doubt empowered in such proceeding, or in any part of it, to establish maximum reasonable rates by reductions, if necessary. While thus empowered, it was without authority to establish the lowest possible lawful rates either on agricultural products, or anything else, until it was prepared to find either that the existing rate structure as a whole yielded a rate of return in excess of the statutory standard, or until it had established such a rate structure as would yield such rate of return. It did not and could not make either finding. The first, if made, would have been contrary to the facts recited in the opinion, while the second could not, of course, be made until the investigation as a whole had been completed.

3. That the Commission so proceeded affords the only reasonable explanation of the treatment accorded to the carriers successive efforts to secure a postponement of the order and a rehearing.

That the Commission considered itself discharged from giving effect to Section 15a, provided only that it

was satisfied that the reductions ordered would not immediately threaten the maintenance of an adequate system of transportation, is further evidenced by its action upon the carriers' successive petitions for rehearing. The record was closed in September 1928 (R. 8). The last full year of operation preceding was the calendar year 1927. The order was entered July 1, 1930. Its effective date was thereafter postponed from time to time because of the mechanical difficulties involved in the preparation and printing of the numerous tariffs containing the hundreds of thousands of rates to be revised (R. 280). Between the close of the record and the date of the order, conditions so materially changed that the record upon which the order was based had ceased to become representative of existing conditions.

The powers of the Commission under Section 1, and its duties under Section 15a are both of a continuing character. The orders of the Commission are supposed to be and should be responsive to the present conditions and those of the immediate future, not to those of the past. This the Commission itself recognized in *Reduced Rates 1922, supra,* wherein it ordered a general reduction of 10% in all rates at a time when the revenues of the carriers were far below the statutory requirement and because of its prophecy in respect of the immediate future. Both petitions for rehearing were submitted before the order had become effective.

In the carriers' second petition for rehearing the attention of the Commission was called to the fact that their rate of return had declined from 3.83% in 1927 to 3.10% in 1930 and that their current rate of return was

even lower by reason of the continuing decline in the volume of traffic handled (R. 518). This petition for rehearing further alleged that by reason of such decline in net railway operating income the retention of their bonds as approved investments for savings banks and insurance companies had been placed in jeopardy and their credit had already become seriously impaired (R. 529). These facts the carriers offered to prove if a rehearing were granted (R. 511). The petition was denied by the Commission 13 days after it was filed (R. 39).

It is difficult to understand how, if the facts alleged were true, the Commission could still adhere to its conclusion that a further reduction in the carriers' revenues, estimated by a concurring Commissioner at $15,000,000 or more (R. 187), and by the carriers in their petition at $20,000,000 (R. 18), would not threaten the maintenance of an adequate system of transportation. Since the Commission had also found that the benefit to the producer, if any, would be speculative, while the effect upon the carriers would be immediate and severe (R. 93), it is also difficult to understand how the denial of the petition for rehearing can be reconciled either with the previously expressed conclusion or with the continuing duty of the Commission under Section 15a. The only rational explanation of this action, unless it be deemed to be purely arbitrary, was that the Commission, as indicated by the foregoing excerpts from its report, was proceeding upon the theory either that it was relieved from its duties under Section 15a in respect of the rates on agricultural products, affected by depression, or that Section 15a was merely permissive in its effect and in reality cast no positive affirmative duty upon the Commission.

VI

THE COMMISSION EXCEEDED THE POWER CONFERRED BY SECTIONS 1 AND 15 AND APPLIED A STANDARD OTHER THAN AND DIFFERENT FROM THE STANDARDS OF SAID SECTIONS.

If it be true, as we believe, that Section 15a qualifies Section 1, then it is clear that in establishing the lowest possible lawful rates on grain and grain products in the absence of a finding that the carriers' rate of return exceeded the statutory standard and at a time when, on the contrary, it was materially less, the Commission exceeded the authority conferred by Section 1, as well as acted in disregard of Section 15a.

There are other reasons why in so doing it exceeded the power conferred by Sections 1 and 15.

1. The carriers were ordered not to charge rates to exceed those prescribed by the Commission. The rates were therefore prescribed as maximum reasonable rates, not as minimum rates.

Section 1 declares that all rates shall be just and reasonable.

Section 15(1) authorizes the Commission to fix either maximum, absolute, or minimum rates. The prescription of a maximum rate prohibits the carrier from charging any more, but permits it to charge less. The fixing of a minimum rate precludes the carrier from charging any less, but leaves it free to charge more. The prescription of an absolute rate precludes the carrier from charging

either more or less. In the court below counsel for the United States, the statutory defendant, conceding that the rates established were established as the lowest possible lawful rates, argued that the Commission was empowered so to do by Section 15(1), which empowers it to prescribe minimum as well as maximum rates. Such he says was the power exercised in this case. The difficulty with this argument is that, as appears from the order, the rates were prescribed as maximum reasonable rates and not as minimum rates.

The order of the Commission requires the establishment of rates "which shall not *exceed* those prescribed in Appendix D of said report" (R. 273; italics ours). The power which the Commission exercised in this case, therefore, was not the power to fix a minimum rate, but the power to prescribe a maximum rate. If the Commission had exercised the former power and not the latter, the result would have been that the carriers would have been required to increase all the rates which are below those prescribed as minimum and would not have been required to reduce any rates which are in excess of such minimum. In such circumstances, it is safe to assert that this proceeding would never have been brought.

2. The exercise of the power to prescribe a minimum rate is the exercise of the power to prescribe the lowest possible lawful rate, i.e., one below which the carrier may not lawfully go. It may not at the same time be the standard of a maximum rate.

The power to prescribe the minimum rate was conferred in order to authorize the Commission to prevent

the carrier from making an unreasonably low rate, *i.e.*, a rate below the lowest possible lawful rate.

This was added as an amendment to Section 15(1) by Section 412 of the Transportation Act, 1920. In its Thirty-third Annual Report to Congress, dated December 1, 1919, the Commission made the following recommendation (p. 4):

> "Under the policy theretofore followed by our Government all efforts to restrict the full play of competition between carriers have been frowned upon or prohibited. Obviously competition between carriers that is wasteful or unnecessarily expensive lays an added burden upon the ratepayers. Elimination of wasteful or unduly expensive competition in rates or service is desirable and under the exercise by the Government of its power to regulate the service and the rates which the carriers may charge and to require an abatement of all unjustly discriminatory, unduly prejudicial, or unduly preferential charges, regulations, or practices, carriers might well be permitted and encouraged to coordinate their activities and merge or consolidate their lines to such an extent as is, after thorough investigation and full hearing, sanctioned by the regulating body. The rates should not be higher than the shipper may reasonably be required to pay and should not be lower than the carrier may reasonably be required to accept. The regulating tribunal should have authority to prescribe not only the ***maximum*** which the carrier may charge, but also the ***minimum.*** This power would restrain an individual carrier from furthering its own ends at the expense of others by unwise and unwarranted upsetting of reasonable rate adjustments. If the

rates and charges are by regulation confined within the reasonably narrow limits between the maximum and minimum reasonable charges, no public interest can be injured by the carriers all maintaining charges within those limits."

In reporting favorably upon the Transportation Act, the House Committee (House Report No. 456, dated November 10, 1919) said:

"MINIMUM AND MAXIMUM RATES.

"Under section 412 the commission is authorized to fix minimum as well as maximum rates. Under the Interstate Commerce act the commission ever since 1887 has only been empowered to declare the maximum rate to be charged. As a result of the testimony the committee believes that the commission should also be granted authority to prescribe joint rates, or maximum, or minimum, or maximum and minimum joint rates. With this power the commission could prevent a rail carrier from reducing a rate out of proportion to the cost of service, by establishing a minimum, below which such carrier could not fix its rate. It would also prevent a rail carrier from destroying water competition between competitive points by prohibiting such carrier from so reducing its rates as to destroy its water competitor. Circumstances have been cited where the rail carrier destroyed its water competitor by such a reduction of rates as to make it impossible for the water carrier to survive. When once competition was thus driven off the rail rates would be restored or would rise to even higher levels. The power to fix minimum rates will also enable the commission to adjust many cases under the fourth sec-

tion of the Commerce act, known as the 'long and short haul clause.' "

The power to prescribe the lowest possible lawful rate is therefore the power exercised when the Commission prescribes a minimum rate, a rate below which any other rate becomes unlawful. The carrier may, however, charge as much more as it pleases so long as it does not exceed a maximum reasonable rate. Manifestly, the lowest possible lawful rate may not at the same time be the standard by which the highest as well as the lowest rates which the carrier may make is to be determined.

3. The lowest possible lawful rate may not be used as the measure for the determination of maximum reasonable rates.

(A) COUNSEL FOR THE COMMISSION IN THE COURT BELOW CONCEDED THAT IT COULD NOT BE MADE THE MEASURE OF DETERMINING THE LAWFULNESS OF EXISTING RATES.

In the Court below counsel for the Commission conceded that, if the existing rates were reasonable, the Commission was without power to reduce them, i. e., to reduce them to a lower point in the zone of reasonableness and hence to the lowest possible lawful rate. This, it is apparent, is equivalent to saying that the "lowest possible lawful rate" standard could not be employed to measure the reasonableness of existing rates. They asserted, however, that the Commission, having found the existing rates to be unreasonable, was empowered to establish in

lieu thereof the lowest posible lawful rates, although it would have been compelled to leave any existing rate, which was the highest possible lawful rate, in effect.

(B) NEITHER MAY IT BE MADE THE MEASURE FOR DETERMINING THE MAXIMUM RATES TO BE ESTABLISHED IN LIEU OF THOSE FOUND TO EXCEED SUCH MAXIMUM.

In other words, the argument for the Commission was that, while the Commission could not measure the reasonableness of existing rates by the "lowest possible lawful rate" standard, it could measure the reasonableness of the rates to be established in lieu thereof by such standard. We confess to be unable to understand the distinction.

In *Ann Arbor R. Co.* v. *United States, supra,* the order of the Commission was set aside because the Commission measured the reasonableness of the rates involved, and fixed the new rates prescribed by it, by the application of standards and tests other than and different from those prescribed by the Interstate Commerce Act. The measure therein employed was that of the "lowest possible lawful rate". It may be that the opinion of the Court emphasizes the application of this standard to the determination of the reasonableness of the existing rates, but it would seem to be plain that if it constitutes an improper measure of such rates it likewise constitutes an improper measure for the determination of the new rates to be prescribed by the Commission. It is inconceivable that there may at the same time be two standards, one by which existing rates are to be measured, and the other by which new rates to be prescribed are to be measured.

The very fact that the power exercised was the power to establish maximum rates makes it conclusive on the face of the report itself that the Commission employed an erroneous standard in the exercise of such power. The establishment of the "lowest possible lawful rate" as the "maximum reasonable rate" is in itself a contradiction of terms. The lowest possible lawful rate can never be the maximum reasonable rate. For this we need no other authority than the Commission itself which has said that there may at the same time be a figure representing a highest possible lawful rate and a lowest possible lawful rate. The Commission in employing the lowest possible lawful rate as the standard for the fixation of maximum reasonable rates, employed a standard which under the very language of the statute itself is inconsistent with the determination of a maximum reasonable rate. It could not have made the rates any lower than it did if it had been establishing a minimum rate.

As we have already pointed out (*supra*, p. 61), the Commission itself distinguished between a maximum reasonable rate and the lowest possible lawful rate in *Muller* v. *Pere Marquette R. R. Co., supra,* and in *South Carolina Produce Association* v. *Aberdeen R. Co., supra.* The former, it said, was of necessity lower than the latter. These cases also illustrate the absurdity of the argument that, while the Commission may not reduce any rate not now higher than a maximum reasonable rate to the level of the lowest possible lawful rate, it may reduce any rate which now exceeds a maximum reasonable rate to such level.

Under this argument the Commission was without authority to make any reduction in the *Muller* case be-

cause it had found that the existing rate did not exceed the reasonable maximum rate. Under the theory now propounded, however, if the rate had been 45¢ instead of 44¢, the Commission would have been empowered to reduce it to any point in the zone which it chose, including the lowest point. The argument, in other words, is, that while the Commission may not touch a rate which does not exceed a maximum reasonable rate, if it does exceed it, it may reduce it below the very standard, by which it is bound in passing upon the reasonableness of the existing rate. There is, therefore, one standard by which to determine whether the *existing* rate is a maximum reasonable rate, and another by which to determine the *future* rate. But the problem is the same in either case, viz., what is a maximum reasonable rate. Clearly, the standard must be the same in both cases, and in neither case may it be that of the lowest possible lawful rate.

4. It appears from the report as a whole, as well as from the action taken, that the reasonableness and lawfulness of existing rates, as well as those prescribed for the future, were measured by comparison with the lowest possible lawful rates, referred to in the resolution. In so doing the Commission applied a standard, the use of which was erroneously supposed by it to be required by the resolution, and which but for the resolution it would not have been required to employ.

The ultimate finding upon which the appellees rely is that the existing rates exceed reasonable rates to the extent that they exceed those prescribed (R. 111). It is

upon this ultimate finding that the order is based. By the very finding relied on to support the order the Commission measured the extent by which the existing rates exceeded lawful rates by the same standard employed in prescribing rates for the future. It is by the amount of this excess that the existing rates are declared to be unreasonable. It was by the deduction of the excess that the rates prescribed were determined. Nor is this a mere play on words. It was the only rational and orderly course to pursue, viz.: first to define the standard, next to measure the lawfulness of the existing rates by such standard, and then to reduce any that exceeded it by the extent of the excess. This is precisely what the Commission, in the finding relied on, says it did.

What was the standard used? It was that of the "lowest possible lawful rates" referred to in the resolution. This phrase owes its origin to the Hoch-Smith Resolution and appears therein for the first time in the literature of rate-making. It is immaterial, whether independently of the resolution, the Commission was authorized to employ it or not. No provision of the Interstate Commerce Act *required* its use. No provision of the Interstate Commerce Act made any rate "unlawful" because it exceeded the lowest possible lawful rate. The Commission acted as it did under the supposed compulsion of the resolution to prescribe such rates on agricultural products affected by depression. Consequently it determined the reasonableness and lawfulness of the rates, existing and proposed, in the light of the supposed purpose and requirements of the resolution. By so doing it applied a standard of lawfulness, supposed to be contained therein, which but for the resolution it would not

have been required to apply. This is precisely the error by reason of which its order was set aside in *Ann Arbor R. Co.* v. *U. S.*, *supra*. In other words, its error in that case was in supposing that the resolution required the Commission to do something, which it would not have been required to do otherwise, and had the effect of rendering unlawful rates which, but for the resolution, would be lawful. The Commission, therefore, employed standards other than those which it was required to employ by the Interstate Commerce Act.

We think it also, as in the *Ann Arbor* case, applied a different standard. Certainly it did so, if as stated by Mr. Eastman the words "just and reasonable rate" must be read in the light of the resolution (R. 172). This can only mean that when so read, they have a different meaning from what they have in the act when read apart from the resolution.

That the Commission used the standard, referred to in the resolution, in determining the lawfulness of the existing rates as well as in the prescription of new ones also appears from the action taken. The general level of the rates, approved immediately prior to the adoption of the resolution is reduced 13%. This reduction is unaccompanied by any discussion whatsoever of the standards customarily employed under the Interstate Commerce Act. Rates prescribed as reasonable maximum rates during the pendency of the proceeding, subject only to a reserved jurisdiction to determine whether they are also the lowest possible lawful rates prescribed in the resolution, are reduced in substantially the same percentage. A scale of maximum reasonable rates, made during the pendency of the resolution, for application over the entire

Southwest, after the most careful consideration, is materially reduced. A rate previously established as a minimum rate is reduced more than 50%, and one under which Fourth Section relief had been accorded, by more than 33-1/3%. Proportional rates, concededly among those commonly denominated "depressed" rates, are reduced on an average of 30%. All these rates could not have become unreasonable overnight under the standards of the Interstate Commerce Act. The Commission clearly applied thereto, as well as in the prescription of the new rates, a standard of conduct supposed to have been created by the resolution under whose supposed compulsion the reductions were made.

The Commission thus committed the same error as in *Ann Arbor R. Co.* v. *U. S., supra,* by applying to the rates on agricultural products standards and tests of lawfulness supposed to have been created by the resolution. Whether, except for its compulsion, the Commission would have acted as it did, does not appear. That it would not may be fairly inferred from the relation of its action to the action previously taken, in the cases enumerated, before the compulsion erroneously presumed to arise from the resolution.

We think the Commission also committed the further error, as in the *Ann Arbor* case, of applying a different and lower standard than that of the Interstate Commerce Act. Such would appear to be the only explanation of the drastic character of the reductions made. To take a single illustration, to wit, the reduction of the proportional rate of 23½¢ from St. Louis to Little Rock, which had been fixed by the Commission as a *minimum*

rate, to 10¢ (R. 26, 244). It is inconceivable that a rate so fixed could, under any circumstances, have become such as to be more than double a reasonable rate under the standards of the Interstate Commerce Act. Nor is this an isolated rate. Reference to table in Appendix D (R. 244), containing the present and prescribed proportional rates, shows how uniform were the reductions therein and the extent to which the general scheme of proportional rates was fitted with the rate from St. Louis to Little Rock, not only to the entire South and Southwest but to all of the proportionals. These proportional rates were among the most important rates fixed. In reducing a rate theretofore prescribed as a minimum rate by more than 50%, the Commission could not have been employing the standards of the Interstate Commerce Act but must have been employing other and lower standards erroneously supposed by it, as in the *Ann Arbor* case, to have been created by the resolution. The probable explanation of this error lies in the fact that the Commission had conducted this investigation from the time of its inauguration up to 30 days before the decision of the Court in the *Ann Arbor* case, and had had it under submission for eleven months prior thereto, while proceeding on the misapprehension of the effect of the resolution upon the standards to be used, involved in the *Ann Arbor* case (R. 21). Within the intervening period it did not fully perceive the effect of that decision and thus committed error (p. 145, *post*).

VII

ASSUMING THAT THE COMMISSION MAY, IN A PROPER CASE, ESTABLISH THE LOWEST POSSIBLE LAWFUL RATES, IRRESPECTIVE OF THE CARRIERS' RATE OF RETURN, THIS IS NOT SUCH A CASE.

1. The Commission is not empowered by the Act to establish the lowest possible lawful rates, because of a depression in the industry affected, and certainly not at a time when the carriers' rate of return is far below the statutory standard.

The action taken was taken by reason of the depressed condition of agriculture. In the next previous grain case of general scope (*Rates and Charges on Grain and Grain Products,* R. 341), and prior to the adoption of the resolution, the Commission, despite such depression, had refused to reduce the rates. In that case it had said that while the depressed condition of the industry might be taken into account in considering the value of the service, it could not itself be made the basis for a reduction in rates:

> "In considering the reasonableness of rates the economic condition of an industry may be relevant as it bears on the value of the service to the industry, and as it may be permanently or for a long period of time affect the ability of that industry to pay the rates assessed, but taken by itself it cannot be accepted as controlling" (R. 379).

In *Southern Pacific Co.* v. *Interstate Commerce Commission, supra,* the Court held, prior to the enactment of

Sec. 15a, that while every shipper was entitled to a reasonable rate, the Commission could not reduce existing rates in order to protect the investment of the shipper or by reason of his supposed necessities.

In *Ann Arbor* v. *United States,* speaking of the words which the resolution contains, "at the lowest possible lawful rates compatible with the maintenance of adequate transportation service", the Court said:

> "Considering the connection in which these words are brought into the sentence, we think they fall much short of supporting the construction adopted by the commission. They are more in the nature of a hopeful characterization of an object deemed desirable if, and in so far as, it may be attainable, than of a rule intended to control rate making. See *United States* v. *New York Central R. R. Co.,* 263 U. S. 603. Of course they should not lightly be disregarded. Neither should they lightly be accepted as overturning positive and unambiguous provisions constituting part of a system of laws reflecting a settled legislative policy, such as the Interstate Commerce Act. If they mean no more than that the depressed condition of the industry is to be given such consideration as may be reasonable considering the nature and cost of the transportation service and the need for maintaining an adequate transportation system, they work no change in the existing law. * * *" (pp. 668-669).

Earlier in the opinion the Court had said:

> "The third paragraph was construed by the commission as making a change 'in the basic law,

> as placing agricultural products in a 'most favored' class, and as justifying a reduction in the rates on deciduous fruits moving from California to eastern points, notwithstanding most of the carriers 'have not as yet made the fair return' for which § 15a of the Interstate Commerce Act makes provision as a means of securing the maintenance of an adequate transportation system. * * * " (pp. 667-668).

In the first excerpt quoted the reference to the "need for maintaining an adequate transportation system" must be read in connection with the prior passage as having reference to the provisions of Sec. 15a. The Court thus made it plain that since the enactment of Sec. 15a the right of the Commission to take the depressed condition of industry into account is further limited by the requirements of that section.

Moreover, although in this case the Commission found that the condition of agriculture was depressed (R. 77), it also found that the benefit, if any, to the producer from a reduction in rates was more or less speculative (R. 93). Nor was the order predicated on any finding in respect of the cost of the service. If it had been it would still have been void because of the failure to give effect to Section 15a. The order was based solely upon the depressed condition of the industry. In so doing the Commission exceeded the powers conferred by Sec. 1 by giving to such condition controlling weight, and violated the duty imposed by Sec. 15a in failing to give proper weight to its requirements.

2. The resolution did not make it the duty of the Commission so to do. Nor may the order be sustained, if made out of deference to the supposed wishes of Congress, expressed therein, but not amounting to a direction.

It is, we think, apparent that the Commission was induced so to do by reason of a duty supposed to have been imposed by the resolution. The resolution imposed no such duty, as is made evident from the foregoing excerpt from this Court's opinion. The words employed, as stated by the court, were "more in the nature of a hopeful characterization of an object deemed desirable" than of a rule of conduct. The Court refers to *United States* v. *N. Y. Central R.R. Co.*, 263 U. S. 603. Commissioner Eastman said the duty remained, despite the decision of this Court in the *Ann Arbor* case (R. 168). Whether the Commission as a whole concurred, or acted out of deference to the supposed hopes and desires of Congress is immaterial. In either event the order is equally bad. *United States* v. *N. Y. Central R.R. Co., supra.* Assuming that the Commission may have the power asserted, it may not exercise it out of mistaken deference to a supposed wish of Congress. When so exercised it ceases to represent the administrative judgment of the Commission. The action in the previous case, as contrasted with the action here, makes it plain that the reductions required to be made were made by reason of the resolution and not independently thereof. That such was the impelling cause appears from a consideration of the report as a whole and of all other pertinent facts.

Even though, contrary to the arguments herein made, the Commission is possessed of the power asserted,

viz., to establish the lowest possible lawful rates in the exercise of the powers conferred by Sections 1 and 15, such power was not lawfully exercised in this case.

3. The Commission's error arose from its failure to perceive the conflict between the conception of its powers and duties, under which it acted, and the decision in *Ann Arbor R. Co.* v. *United States*, as evidenced by the interpretation placed upon that decision in the concurring opinion of Commissioner Eastman, which contains the only extended review of the applicable law to be found in the report.

To our minds the conception of power and duty under which the Commission acted is plainly in conflict with the decision in *Ann Arbor R. Co.* v. *U. S., supra.*

As intelligent a man as Commissioner Eastman, however, saw no conflict between the two. On the contrary, he said that such conception was wholly consistent with the decision of the Court. He quotes with approval the Commission's interpretation in *Rates on Grain and Grain Products, supra,* in which the Commission said:

> "It sets no new standard of lawfulness, but provides, in effect, that to the extent that there are flexible limits to our discretion, we shall *require* the maintenance of the lowest rates falling within those flexible limits. Rates that may lawfully be required must in principle be high enough to cover all of the cost that may fairly be allocated to the service plus at least some margin of profit. * * * The substance of the provision of the resolution quoted above is that agricultural

> products affected by depression shall in this respect *be included in the class of most favored commodities, to such extent, at least, as may be 'compatible with the maintenance of adequate transportation service.'*" (R. 169, italics ours.)

He then said:

> "In my judgment this interpretation is entirely consistent with the provisions of the interstate commerce act, although it may be that for the sake of clarity we should have used the words 'some substantial margin of profit.'"

This explains his earlier statement that

> "In a situation like that which is here presented [meaning, obviously, where the products involved are agricultural products shown to be affected by depression], that resolution makes it our duty to prescribe the lowest possible lawful rates compatible with the maintenance of an adequate transportation service" (R. 168).

Under such conception, as stated, but two questions were presented for determination, first, were the products in question so affected, and second, what were the "lowest possible lawful rates?"

The Commissioner points out that he dissented in *California Growers & Shippers Protective League* v. *S. P. Co., supra,* because he thought the rates prescribed were lower than the lowest possible lawful rates. The Commissioner, therefore, saw in the opinion of the Court but an affirmance of his view, theretofore expressed, that in determining the lowest possible lawful rates, the Com-

mission was not to use standards other than those of the Interstate Commerce Act. What he failed to perceive was that the Court, in addition, held that the resolution did not control the discretion of the Commission or *make it its duty* to establish the lowest possible lawful rates on agricultural products, even though found to be affected by depression.

None of the numerous Commissioners filing concurring opinions disagreed with the views expressed by Commissioner Eastman, which were but a restatement of a interpretation placed upon the resolution by the whole Commission originally.

Mr. Eastman, in his concurring opinion, and the Commission itself in the report, from which he quotes, also failed to perceive that the very purpose of Sec. 15a is to prevent the Commission from exercising "the flexible limits" of its "discretion" so as to prescribe "the lowest rates falling within such limits" at a time when the carriers' rate of return is inadequate, particularly when such action is based solely upon the existence of depression in the industry affected. This, we think, is also made plain by the decision in *Ann Arbor R. Co.* v. *U. S.*, but if not, it clearly follows from both the phraseology and the purpose of Sec. 15a. As we have said, the purpose of that section is to require the Commission, in the exercise of its powers to establish reasonable rates (*i.e.*, in the exercise of the flexible limits of its discretion, theretofore conferred by Sections 1 and 15), to exercise such discretion, within those limits, so as to produce out of the aggregate of all rates so fixed, a fair rate of return, as nearly as may be. This, for the reasons stated, clearly

excludes the right at such a time to make "the lowest rates" permissible under an unrestrained exercise of such discretionary power.

Nor is it surprising if the Commission failed to perceive the full effect of the Court's decision in the thirty-days intervening between its rendition and the entry of the order and thus to conform the latter thereto. This proceeding was instituted under the Hoch-Smith Resolution and conducted and submitted at a time when the Commission was proceeding under the misapprehension of its powers and duties under the resolution, condemned by the Court in that case (R. 21, 69). At the time of its decision this case had been under review by the Commission, after submission, for a period of eleven months (R. 69). The final report was in course of preparation as early as November 1929, seven months prior to the decision of the Court (R. 21) . The record consisted of over 53,000 pages of transcript and more than 2,000 exhibits (R. 147). More than three score of major issues were involved (R. 147). It is not surprising if the Commission, including Mr. Eastman, within the thirty days available, failed to perceive the full import of the Court's decision and to reexamine this enormous record in the light thereof, but by reason of such failure of perception perpetuated in part, if not in whole, the error under which it had theretofore conducted and considered the case.

VIII

THE ORDER OF THE COMMISSION CANNOT BE SUSTAINED BY REASON OF THE FACT THAT THE COMMISSION AT THE SAME TIME READJUSTED MANY INEQUALITIES IN RATES, THEREBY REMOVING DISCRIMINATION.

In the Court below counsel for the appellees placed great reliance on this fact. The Commission by its order sought to exercise two powers: (1) To redetermine and establish the general level of the rates; (2) to correct and remove discrimination.

The propriety of its action in the ~~former~~ latter cannot cure the making of an order in respect of the ~~latter~~ former, if based upon a misconception of the powers and duties of the Commission. Moreover, the primary issue was that concerning the general level of the rates. This the report itself makes plain (R. 77, 147-8). The correction of individual maladjustments was more or less incidental for this task. Moreover, it is perfectly plain that all of the former could have been corrected and the revenues of the carriers preserved. It was unnecessary to reduce all of the rates or any of the rates to remove discrimination. It was certainly unnecessary to reduce the general level of the rates and the revenue of the carriers by 13%.

The power exercised on this branch of the case was under Section 3. The object of the proceeding was to bring the rate structure into harmony with all provisions of the act. This included Sec. 15a as well as Sec. 3. It appeared from the report that the revenues of the

carriers were far below the statutory standard. Under Sec. 15a the Commission was under the positive duty to protect and preserve such revenues so far as consistent with other requirements. Such course could have been pursued and every mandate of Sec. 3 heeded. The more stoutly counsel for appellees seek to sustain the order by reason of the fact that it revised the relationship of rates between grain and grain products themselves for the purpose of removing violations of Sec. 3, but on a materially lower general level of rates and at an unnecessary sacrifice of revenue, the more completely they convict the Commission of having acted in disregard of Sec. 15a. And if we be right in respect of our interpretation of Sections 1 and 15 and of the lack of any authority in the Commission to prescribe "the lowest possible lawful rates" as maximum reasonable rates under the circumstances presented, the more they convict the Commission of having acted in excess of the powers conferred by this section through the removal of such discrimination by the establishment of the lowest possible lawful rates.

IX

THE ULTIMATE FINDING WHICH THE REPORT CONTAINS THAT THE PRESENT RATES ARE UNREASONABLE TO THE EXTENT THAT THEY EXCEED THOSE PRESCRIBED IS NOT IN ITSELF SUFFICIENT TO SUPPORT THE ORDER.

In the court below the appellees relied heavily upon the fact that the report contains an ultimate finding, ex-

pressed in the words of the statute, that the present rates are unreasonable to the extent that they exceed the rates prescribed (R. 111). This alone is insufficient. The report reviewed in *Ann Arbor R. Co.* v. *United States, supra,* contained a similar finding in respect of which the Court said:

> "* * * True, in both the original and supplemental opinions it is said that the existing rates are unreasonable, but the opinions taken as a whole show that this means the rates were deemed unreasonable under the joint resolution when construed as the commission construed it, and not that they were deemed unreasonable under §1(5) or §3(1) of the Interstate Commerce Act. Throughout the opinions it is manifest that the commission was testing the reasonableness and validity of the rates by considerations not applicable under those sections but believed by it to have been brought into the problem by the resolution." (281 U. S., at p. 666.)

Prior to that decision it had become well settled that the making of such an ultimate finding, expressed in the words of the statute, is insufficient to support an order made, if it otherwise appears to have been based upon the application of standards other than those of the Interstate Commerce Act, or upon a misconception of the Commission's powers and duties. *Southern Pacific Co.* v. *Interstate Commerce Commission, supra,* 219 U. S. 433, 443. See also *Florida* v. *United States,* 282 U. S. 194, decided subsequently to the *Ann Arbor* case.

Such a finding is thus not conclusive in any case. Where, as in this case, there is an absence of any finding sufficient to support it, it is entitled to even less weight than ordinarily accorded such a finding.

Similarly, the Commission's statement that "the findings herein are under the provisions of the interstate commerce act" (R. 111*), is quite insufficient to support the order. A mere statement that the Commission has complied with the terms of a statute, naming the statute, can rise no higher than a statement expressed in the words of the statute (cases cited, *supra*), or a statement that the Commission has considered all the pertinent evidence (*Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 86), or that the Commission has carefully considered the various factors required by the statute to be considered by it (*Bluefield Co.* v. *Public Service Commission*, 262 U. S. 679, 688-689).

The statement made is no more than a declaration that the Commission proceeded under the Interstate Commerce Act, as it understood and interpreted it. The decision of any tribunal carries with it the declaration, whether expressed or not, that the tribunal making it has construed and properly applied the applicable law under which it is proceeding. If it appears, that it did not, its action will be set aside or reversed, however honest the belief thus expressed may have been. Judicial review of the Commission's orders may not be precluded by any such self-serving declaration.

---

*The full statement by the Commission follows:

"FINDINGS UNDER INTERSTATE COMMERCE ACT

The Supreme Court of the United States recently interpreted the Hoch-Smith resolution as setting up no standard of reasonableness of rate level or relation other than that already provided by the interstate commerce act. *Ann Arbor Railroad Company* v. *United States*, U. S., , decided June 2, 1930. The findings herein are under the provisions of the interstate commerce act."

X

THE COMMISSION CONSIDERED MATTERS OUTSIDE OF THE RECORD. FOR THIS REASON ALONE, ITS ORDER IS VOID AND ITS ENFORCEMENT SHOULD BE ENJOINED.

Towards the conclusion of the report (R. 147) the Commission said:

> "The action here taken represents the fullest possible response to all the mandates of the law affecting, among other things, the important subjects of levels and relations of rates, the natural and proper development of the country as a whole, and the maintenance of an adequate system of transportation. The future volume of movement of wheat and other grains between specific points can not be accurately known. It follows that the revenue effects of the increases and decreases which will follow the effectiveness of our action herein can not be precisely stated. We have made many different *checks and estimates*. While the reductions far exceed the increases, and the corresponding revenue effects will be substantial, the full effect upon revenues can not be adequately foretold, in view of the limitations upon transit, the elimination of transit balances outbound from primary markets, and the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates. We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation. We say this especially in the light of *increased revenues already granted in certain other*

cases, and in the realization that a failure of the present revision to afford adequate revenues will prompt further proceedings." (Italics ours.)

The Commission thus declares that it was required (by the "mandate of the law") to consider, among other things, the effect of its action upon the maintenance of an adequate system of transportation. Its statement "that the readjustment will not threaten the maintenance of an adequate system of transportation" is a finding of fact in respect of this issue. It was a finding essential to the decision rendered, on the Commission's own theory of its powers and duties, whether erroneous, as we have urged, or not. The Commission had already found that the carriers' revenues were and had been continuously for a long period of years below those required by Section 15a (R. 77). It knew that the order proposed to be made would materially reduce such revenues still further (R. 148). Its finding that these reductions would not, however, threaten the maintenance of an adequate system of transportation was based upon (1) certain checks and estimates of the revenue effects of the action to be taken, and (2) the effect of action taken in certain other cases in increasing revenues. This essential finding of fact, therefore, was based upon balancing the revenue effects of the reductions proposed to be ordered, on the one hand, and the increased revenues supposed to be produced from action taken in other cases on the other hand. The correctness of the conclusion reached, therefore, depended upon the correctness of the two estimates thus made and balanced against each other. This was clearly a finding of fact upon a material issue

and as such required to be based upon evidence. The carriers were entitled to an opportunity to be confronted with both sets of estimates, to check them, to cross-examine their makers and to offer evidence in rebuttal.

It is alleged in the bill that none of the evidence of estimates relied on was of record in the case (R. 31-2). This allegation is supported in addition by the affidavits of counsel representing the carriers in the conduct of the case (R. 654-6). No counter-affidavits were filed. It is true that the record, consisting of 53,000 pages and 2,100 exhibits, was not offered for the purpose of establishing the truth of this allegation. On the application for a temporary injunction the allegations of the bill and the uncontradicted affidavits of counsel should be taken as true.

Moreover, checks and estimates of losses resulting from the order could not possibly have been in the record for they were checks and estimates of the revenue effects of the order itself, which could not have been determined —even approximately—prior to its rendition.

In so far as the effect of the supposed increases from other cases is concerned it appears from the concurring opinion of Commissioner Woodlock that chief among these cases was the so-called *Class Rates* case (R. 187) (*Western Trunk-Line Class Rates,* 164 I. C. C. 1). This case was decided long after the close of the record in the present case (R. 533) and any estimate of increased revenues which might be received from it could not possibly have been made before the close of the record in the present case or been available for cross examination of the carrier.

Moreover, in their petition for rehearing the carriers alleged and offered to show that any assumption that revenues would be substantially increased as a result of the decision in the *Class Rates* case was wholly erroneous and that whether any increased revenue at all would result was doubtful.

The order of the Commission is thus predicated upon a balancing of estimated decreases, on the one hand, and estimated increases, on the other, neither of which were of record and neither of which the carriers ever had any opportunity to examine or correct. The rule that the Commission's order will be set aside if based upon the consideration of matters outside of the record is not a mere technical rule but one essential for the proper protection of the carriers. In *Interstate Commerce Commission* v. *Louisville & Nashville Ry. Co.*, 227 U. S. 88, 93, the Court said:

> "But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense."

In the more recent case of *U. S.* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, the order of the Commission was set aside because it considered figures contained in

the annual reports of the carriers which they are required to submit to the Commission under oath each year. In setting the order aside, Mr. Justice Brandeis said, page 289:

> "The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties."

The figures upon which the Commission's finding of fact was based were not only open to the criticism made by Mr. Justice Brandeis, but to the additional criticism that their authenticity and accuracy is likewise in question.

XI

THE ACTION OF THE COMMISSION IN OVERRULING THE CARRIERS' PETITIONS FOR REHEARING AND THUS REQUIRING THE ORDER TO BECOME EFFECTIVE AND IN FAILING TO DISCHARGE THE AFFIRMATIVE DUTY IMPOSED BY SECTION 15a TO PROTECT THE CARRIERS' REVENUES IS SO ARBITRARY AND UNREASONABLE AS TO RENDER ITS ORDER VOID AND AS TO ENTITLE THE PETITIONERS TO ENJOIN ITS ENFORCEMENT.

1. The carriers submitted in petitions for rehearing and offered to prove facts showing a fundamental change for the worse in the condition of their revenues and the relation thereto of the grain rates, in the years following the close of the record herein and prior to the effective date of the order herein. These petitions were summarily denied by the Commission, which thereby put the order into effect on a record closed nearly three years before.

The record herein was closed September 22, 1928 (R. 8). The Commission's order was made effective June 1, 1931 (R. 9).

The authority exercised by the Commission was not merely the authority to make findings and to enter an order but to make the same effective. The order operates *in futuro*. It had not become effective at the time the petitions for rehearing were filed, at which time the attention of the Commission was called to the

fact that the order was granted upon a stale record, unrepresentative of present or future conditions. The changed conditions, which had in the interim so seriously affected the revenues and credit of the carriers as to impair the maintenance of an adequate system of transportation, were fully set forth (R. 421, 507).

If there ever may be a case in which the action of the Commission may be set aside because arbitrary and unreasonable, although taken within the form of its delegated powers (*Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547), this would appear to be such a case. If the facts set forth in the petition are true, and they must be taken to be so, the making of these reductions effective at this time is a palpable disregard of the continuing duty imposed upon the Commission by Sec. 15a. Whether the order as originally made was valid or not, the Commisison in refusing to rehear and consider, to take the evidence offered in respect of changed conditions alleged, in addition to acting arbitrarily and unreasonably, plainly failed to discharge the duty imposed upon it by Sec. 15a.

As we have pointed out, rate orders of the Commission operate *in futuro*. It is contemplated that they should be responsive to present and future conditions and not to those of the past, when unrepresentative of present and future conditions. While the granting or refusing of a petition for rehearing rests, in the first instance, within the discretion of the Commission, that discretion must not be abused. The substance of the

allegations contained in the petition for rehearing were matters of common knowledge, although the precise figures were not. In such a case, to refuse to rehear and reconsider and in the meantime to postpone the effective date of the order, puts the Commission in the position of declaring that, despite the provisions of Sec. 15a, the Commission may reduce the net railway operating income of the carriers $20,000,000 per year, at a time when their rate of return is approximately but 3%, and their net railway operating income $234,000,000 less than the contemplated by such section, and at a time when their gross and net revenues are still falling, and notwithstanding that the credit as well as the financial condition of the carriers have been adversely affected by the facts stated (R. 511 *et seq.*). If the Commission in any report should so state its conception of its duties under Sec. 15a, an order based thereon would be clearly void because of the Commission's disobedience of the affirmative mandate of the statute and of its failure to discharge its duty.

In this connection, it is significant to compare the reasoning behind the recent decision of the Commission in the *Fifteen Per Cent* case (*Ex parte 103*), 178 I. C. C. 539, in which the Commission, although recognizing that the carriers' rate of return throughout the country was far below the statutory rate of return, denied to the carriers a horizontal increase on the ground, among others, that the provision of horizontal increases or horizontal decreases throughout the entire rate structure was not an effective way of giving effect to the requirements of Section 15a. If, on the one hand, the Commission says that it cannot give effect to the require-

ments of Section 15a in a rate case dealing with all the rates and, on the other hand, refuses to give effect to it in a rate case dealing with a description of traffic yielding 12 per cent of the rates (this case, R. 78), Section 15a may be taken to have been finally written out of the Act so far as practical use is concerned. If the Commission can reduce the rates on the heavy-loading commodities such as grain which are not in practice carried in large quantities by competitors of the rail carriers (R. 522-528, 529), and on the other hand can refuse to increase other classes of rates because in the opinion of the Commission the new rates would drive the business to such competitors, the rail carriers may as well reconcile themselves to the fact that their legal rights are in the future confined to maintaining all of their rates at or near the lowest possible lawful level.

2. In the main report the Commission had based its decision in part upon an anticipation that its failure to provide adequate revenues would prompt the carriers to bring future proceedings to protect those revenues, and to that extent based its decision in part upon a mere chance that it would prove right instead of basing it exclusively (as was its duty) upon the evidence before it.

The conclusion of the Commission was:

> "We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation. We say this especially in the light of increased revenues already granted in certain other cases *and in the realization that the*

> *failure of the present provision to afford adequate revenues will permit further proceedings.*" (R. 148; italics ours.)

The last clause is a statement that the Commission relied in part in making its decision, not merely upon facts not of record before it, but on a hope or gamble that if the decision it was making was a wrong one, the injured party would protest. It is the duty of an administrative body to reach its decisions through the application of its best judgment to the facts of record before it. The sentence quoted was a confession by the Commission that its conclusion as to the maintenance of an adequate system of transportation was not exclusively based upon the facts of record before it, but was based in part (as we have seen) upon facts not of record, and in part upon the fact that the Commission was so desirous for other reasons to reach the conclusion in question that it was willing consciously to gamble upon the soundness of its conclusion as to the maintenance of an adequate system of transportation. It is unthinkable that a court should reach any decision in a *realization* that if the decision be wrong, the aggrieved party will appeal. Yet the Commission's action here is precisely of the same nature. In effect, the Commission says that it might not have reached this decision if it had been convinced that the injured parties (the carriers) would not be in a position to bring another suit if the decision proved wrong. Surely what is justice for one is justice for another. The Commission cannot be allowed to gamble with impunity the revenues of the transportation system of the country.

and to take action which will threaten the adequate maintenance of that transportation system, because the Commission takes into consideration that the carriers will protest if hurt. This simply means that the Commission has felt free to take a chance on whether its decision is right or wrong.

Such action amounts in effect to the denial of a fair hearing, constitutes an abuse of administrative discretion and renders the order void as in violation of the Fifth Amendment to the Constitution of the United States. The carriers' property is taken, not because the Commission has reached its conclusions after hearing evidence, but because the Commission is taking a chance in reliance on its "realization" that the carriers will protest if hurt. It is submitted that this is not due process of law.

The precarious position into which the maintenance of an adequate system of transportation is brought through this disregard by the Commission of the mandates of Section 15a, is proven by the subsequent events in this case. The carriers' petitions for rehearing represented their effort to bring the very proceedings which the Commission had *realized* that the carriers would bring if their revenues proved inadequate. That realization was, as we have seen, actually one of the grounds for the Commission's decision. Yet when the carriers' revenues in fact proved inadequate,—when over three years had elapsed since the close of the record and the carriers' revenues had fallen from an average of 3.9% (R. 77) to 3.1% (R. 518) and were evidently still falling, and at an accelerated pace (R. 513),—the Commission disposed

of the carriers' offer to prove those facts and all relevant facts by denying the petition for rehearing which such offer was contained, just 13 days after was filed (R. 39).

Respectfully submitted,

WALTER MCFARLAND,
ELMER A. SMITH,
P. F. GAULT,
DOUGLAS F. SMITH,
H. H. LARIMORE,
J. N. DAVIS,
A. B. MASON,
R. J. HAGMAN,
M. L. COUNTRYMAN, JR.,
R. S. OUTLAW,
LESLIE CRAVEN,
A. B. ENOCH,
D. P. CONNELL,
DICK DIXON,
FRANK A. LEFFINGWELL,
Attorneys for Appellees.

FREDERICK H. WOOD,
WILLIAM D. WHITNEY,
G. HOWLAND CHASE,
Of Counsel.

November, 1931.

FILE COPY

DEC 2 19

Supreme Court of the United States

OCTOBER TERM, 1931

No. 287

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

REPLY BRIEF FOR APPELLANTS

WALTER MCFARLAND,
ELMER A. SMITH,
P. F. GAULT,
DOUGLAS F. SMITH,
H. H. LARIMORE,
J. N. DAVIS,
A. B. MASON,
R. J. HAGMAN,
M. L. COUNTRYMAN, JR.,
R. S. OUTLAW,
LESLIE CRAVEN,
A. B. ENOCH,
D. P. CONNELL,
DICK DIXON,
FRANK A. LETTINGWELL,
Attorneys for Appellants.

FREDERICK H. WOOD,
WILLIAM D. WHITNEY,
G. HOWLAND CHASE,
Of Counsel.

December 2, 1931.

INDEX

PAGE

The Commission consciously and deliberately reduced the revenues of the carriers in a substantial amount. The fact that it also removed discriminations and corrected improper practices constitutes no justification of the rate reductions required. . . 3

(a) The Commission consciously and deliberately reduced the revenues of the carriers. 3

(b) The Commission's action in regard to transit cannot be used to support the reduction made in the general level of the rates. 4

(c) The manner in which the Commission revised the relationship of rates and removed discriminations shows that it consciously and deliberately reduced the general level of the rates and the revenues of the carriers. 9

The fact that the report states that the findings are under the Interstate Commerce Act is not, as urged by all the appellees, conclusive that they were based upon a proper conception of the Commission's powers and duties thereunder. 12

It appears from the separate opinions of concurring Commissioners constituting a majority of the Commission, that the action of the Commission was taken in response to a supposed duty to attempt to relieve the condition of agriculture by reduction in rates, irrespective of the requirements of Sec. 15a, provided only the Commission was of the opinion that such reductions would not spell immediate disaster to the carriers. 17

PAGE

4. The Commission's misconception and disregard of Section 15a 25

(a) None of the appellees' briefs deny that the carrier's rate of return was and for many years had been below the statutory standard 25

(b) Whether the rates prescribed were the lowest possible lawful rates or not, it appears on the face of the report and independently of the concurring opinions or of any other consideration, that the order was based upon a misconception of the powers and duties of the Commission under Sec. 15a 25

(c) The relation of the alleged prevention of wasteful practices and of increased revenues supposed to result from other cases to the Commission's misinterpretation of Sec. 15a 28

(d) The Commission did not and could not find that traffic was diminishing under the existing rates or that a reduction in the general level of rates would result in increased traffic 31

(e) The Commission's argument that it performed its duty under Section 15a in the earlier grain cases, itself points the contrast with the present case, in which the Commission disregarded that duty 32

(f) The Commission's misconstruction of Section 15a is conclusively established by its action in regard to the carriers' petitions for rehearing 33

(g) The Commission's brief, in giving an explanation for the misconstruction of Section 15a, again confirms that such misconstruction existed 35

PAGE

(h) The argument in the Commission's brief that the ultimate finding is sufficient because the Commission's duties under Section 15a are to be performed in the exercise of its power to fix just and reasonable rates, is based on a misconstruction of Section 15a, which provides that the Commission shall so adjust the just and reasonable rates themselves as to provide the necessary fair return..... 37

5. Appellees have completely failed to meet the point that the Commission erred in considering decisions of other cases which were not in the record 41

(a) The Commission acted "especially" in the light of increased revenues presumed to have been granted in certain other cases, neither the reports nor the orders in which cases were in the record..... 42

(b) The consideration by the Commission of many different checks and estimates of the revenue effects of its order..... 44

6. Appellees failed to meet the point that the Commission's decision was arbitrary in that it was based upon the realization that a failure of the present revision to afford adequate revenues would prompt further proceedings..... 45

TABLE OF CASES CITED

PAGE

American Express Company v. *Caldwell*, 244 U. S. 617, 624 38
Ann Arbor Railroad Company v. *United States*, 281 U. S. 658 ..... 13, 15, 21, 45

Class Rates case, 164 I. C. C. 1 ..... 43, 44

Fifteen Per Cent case, 178 I. C. C. 539 31

Grain and Grain Products, 122 I. C. C. 235 15,

Increased Rates, 1920, 58 I. C. C. 220 ..... 32, 35
Interstate Commerce Commission v. *Illinois Central R. R. Co.*, 215 U. S. 452 34
Interstate Commerce Commission v. *Louisville & Nashville Railway Co.*, 227 U. S. 88, 93 41

Oklahoma Corporation Commission v. *A. & S. Ry. Co.*, 101 I. C. C. 116 9
Oklahoma Millers League v. *A. & M. R. R. Co.*, 128 I. C. C. 523 9

Public Utilities Commission of Kansas v. *A. T. & S. F. Ry. Co.*, 83 I. C. C. 105 32

Rates and Charges on Grain and Grain Products, 91 I. C. C. 105 32
Reduced Rates, 1922, 68 I. C. C. 676 32
Refined Petroleum Products in the Southwest, 171 I. C. C. 381, 453 21

U. S. v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, 289 41

Supreme Court of the United States

OCTOBER TERM, 1931

No. 287

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

REPLY BRIEF FOR APPELLANTS

Four answering briefs have been filed. Each emphasizes the fact that the Commission, in addition to reducing rates, revised relationships and corrected practices. But all improper practices and discriminations could have been removed without reducing rates or diminishing revenues. By directing attention to these features of the report the appellees seek to distract the attention of the Court from the main issue, viz., did the Commission in reducing the rates proceed upon a misconception of its powers and duties?

In meeting this issue all of the briefs rely chiefly, if not entirely, upon the ultimate conclusion, contained in the report, that the rates were unreasonable to the extent that they exceeded those prescribed and upon the statement, which the report contains, that the findings made are

under the provisions of the Interstate Commerce Act. Neither is conclusive upon the Court (Opening Brief, pp. 146 to 148). The answer made is that the Commission could not have proceeded upon a misconception of its powers and duties under the Interstate Commerce Act because it said it proceeded thereunder, and if so, it must have proceeded upon a proper interpretation thereof. This, of course, is no answer at all.

All of the briefs suggest that the appellants rely chiefly upon the concurring opinions, particularly that of Commissioner Eastman. This is not so. Appellants rely chiefly upon the conclusions to be drawn from the main report itself, supplemented and enforced by the concurring opinions. Commissioner Eastman's concurring opinion is emphasized because it contains what is believed to be an express statement of the conception of power and duty necessarily implicit in the main report. Moreover, as we shall point out in this reply brief, the other concurring opinions disclose that all of their authors, constituting more than a majority of the Commission, were likewise proceeding upon that conception of the Commission's powers and duties which we have endeavored to show appears from the main report as well as from the concurring opinion of Commissioner Eastman.

All of the briefs assert that the appellant's whole case rests upon the contention that the Commission proceeded upon a misconception of the effect of the resolution upon its powers and duties. This is not so. We believe it did. We believe that it was because of this that the Commission failed to give proper effect to the requirements of Sec. 15a. But, as pointed out in our opening brief, and as will be further pointed out in this reply

brief, whether such be the explanation of the Commission's action or not, it appears from the main report itself that the Commission did not properly construe or give proper effect to such section and to its relation to the case before it.

1. The Commission consciously and deliberately reduced the revenues of the carriers in a substantial amount. The fact that it also removed discriminations and corrected improper practices constitutes no justification of the rate reductions required.

(a) THE COMMISSION CONSCIOUSLY AND DELIBERATELY REDUCED THE REVENUES OF THE CARRIERS.

None of the appellees deny that the general level of the rates was reduced by 13%, as stated in the bill (R. 18) and in the appellants' brief. This statement is not capable of denial because it is predicated upon a mathematical calculation based upon the relation of the new rates and the old as contained in the appendix to the order (R. 244, *et seq.*).

None deny that the net result was substantially to reduce the revenues of the carriers. The report states that while the full effect of the order cannot be determined, because of limitations on the use of transit, etc., the "revenue effects will be substantial" because the reductions far outnumber the increases.* This can mean

*The entire quotation follows:

"While the reductions far exceed the increases, and the corresponding revenue effects will be substantial, the full effect upon revenues can not be adequately foretold, in view of the limitations upon transit, the elimination of

nothing else but that the net result, after taking into account all of the matters stressed by the appellees in their briefs, is to reduce substantially the net revenues of the carriers.

This statement was preceded by the statement that the Commission had made many checks and estimates. As pointed out in our opening brief, a concurring Commissioner estimated the resulting revenue losses at at least $15,000,000 per annum (R. 187). Presumably, his estimate was based upon the checks and estimates referred to in the main report, which must have taken into account, if sufficient to base any conclusion thereon, the effect of the new transit rules, etc. The affidavits presented by the carriers show that the loss in revenue would be approximately $20,000,000 per annum and would not be offset to any material degree by the new transit rule (R. 634, 637). No counter-affidavits were filed.

(b) THE COMMISSION'S ACTION IN REGARD TO TRANSIT CANNOT BE USED TO SUPPORT THE REDUCTION MADE IN THE GENERAL LEVEL OF THE RATES.

Considerable space is given in appellees' briefs to a discussion of transit and of the effect thereon of the Commission's order. The Commission itself had no illusions that its decision on the subject of transit (or on the

---

transit balances outbound from primary markets, and the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates" (R. 148).

It will be apparent that the fact that the *full* effect upon the revenues could not be adequately foretold, affects only the quantitative measurement of the reduction, the *fact* of a substantial net loss being conceded.

twin subjects of "the elimination of transit balances outbound from primary markets" and "the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates") altered the fundamental fact that "the reductions in rates far exceed the increases" and that "the *corresponding* revenue effects will be substantial" (R. 148).

Appellees' briefs refer to an estimate in a concurring opinion that the cost to the railroads of transit service is approximately $30,000,000 per year. To avoid misunderstanding, we should point out that this is not by any means the estimated saving from the Commission's decision as to transit. The Commission did not eliminate transit, but in fact ordered that two transit services, plus one inspection stop, should be granted by the carriers on each haul. There is nothing to indicate that the cases in which more than two transit services are rendered, or where excessive back or out-of-lines hauls are permitted, are other than exceptional. The report does not find that they are. Moreover, it has been the practice on the Northern lines to charge for transit; these lines are forbidden by the Order to continue that charge and are ordered to grant the same free transit as the other lines (R. 105). The carriers are still required to perform transit, and to pay for it out of the reduced rates. As pointed out by Commissioner Eastman (R. 158) these services are not furnished free but the cost thereof is included in the rate to which the transit privileges apply. In fact, the inadequacy of the set off to the carriers' revenues provided by the transit provisions of the order is best evidenced by the fact that five Commissioners actually favored a charge for transit (Commissioners

McManamy, R. 149; Eastman, R. 159; Lewis, R. 182-183; Porter, R. 193; and see Commissioner Woodlock, R. 186). Free transit was therefore carried in the Commission by a single vote; and obviously the ground upon which five Commissioners voted against it was that they thought that this might be a means to restore to the carriers a part of the revenues which all the Commission recognized that they were taking from the carriers by their order.

Moreover, as we have pointed out, the affidavits submitted by the carriers in support of the estimated revenue losses expressly stated that the estimates made would not be appreciably affected by the new transit and other rules upon which the appellees lay such stress. The sworn bill estimated revenue losses at approximately $20,000,000 (R. 18). This allegation was supported by affidavits made by the Manager of the Statistical Bureau of the Western lines, who applied the order of the Commission to the entire territory (R. 633, 635-6), and by the accounting or traffic officers of five representative carriers, operating in different parts of the territory, but together covering it all, to wit, Atchison, Topeka & Santa Fe Railway Company (R. 649), Chicago, Rock Island & Pacific Railway Company (R. 644), Missouri Pacific Railway Company (R. 652), Northern Pacific Railway Company (R. 642), and Union Pacific Railway Company (R. 638).

The affidavit made by the Statistician of the Northern Pacific showed that the loss to that carrier would amount to at least $531,000 per annum (R. 643) The Northern Pacific does not now accord transit but is required so to do by the Commission. The Northern Pacific is one of those carriers that operate in the Northwestern territory, where

some of the appellees stress the fact that certain advances were made. It is also one of those two lines in respect of which the Commission in its main report comments upon the fact that although the Northern Pacific and its parallel line, the Great Northern, had together added $216,144,016 to their investment during the period 1916-1926, their combined net railway operating income in 1926 was $3,394,410 less than in 1916 before this additional investment was made (R. 78). Such is the effect upon one carrier of an order which it is said to have preserved revenue by advancing some rates and by prescribing new transit rules.

It appears from the other affidavits that the revenue loss in the district as a whole is $21,980,023 per annum, or 11.29% (R. 637); that the estimated loss to the Santa Fe is $2,523,890 per annum or 13.24% (R. 651), to the Rock Island, $1,612,744 per annum or approximately 10% (R. 647), to the Missouri Pacific $2,142,380 per annum or 21.72% (R. 653) and to the Union Pacific System $2,009,091 per annum or 11.53% (R. 641-642). In each of these affidavits, save that of the Rock Island, it is said that the maker has taken into consideration the effect of the limitations upon transit, the use of transit balances, the prevention of wasteful competition, etc., and that the same will not be such as to materially change the estimated losses stated (R. 637, 642, 651, 654). The affidavit made by the Auditor of the Rock Island did not contain such a statement but did contain the statement that it was based upon a study of the rates, *rules and regulations*, contained in the order (R. 645). All of these lines operate in part in so-called Western trunk line or Mid-Western territory, where some of the appellees

stress the fact that the coarse grain rates were increased. These affidavits take into account such increases, as well as decreases in other rates. Together they are representative of all parts of the District, midwest, southwest, northwest and Pacific coast.

As previously stated, no counter-affidavits were submitted. As appears from the report, the Commission made certain checks and estimates of the revenue effects of the order (R. 148). Presumably, these checks and estimates took into account the effect of the new transit rules and the elimination of the use of transit balances, provided the record in the case was such as to permit it. If they did, then the Commission was in a position to controvert the appellants' affidavits in respect of the effect of these rules, etc., upon the net revenue losses resulting from the order, if erroneous. If the checks and estimates, referred to in the report, did not take the same into account, or if the record before the Commission was such that the effect thereof could not be determined, then the Commission had no right to base its order upon the assumption that the required changes in rules governing the use of transit and of transit balances would afford any substantial offset to the reductions in rates. There is nothing in the report which indicates that the Commission at the time it was made had any such opinion. But if it did, and such opinion was supported by anything tangible, the Commission had an opportunity to file counter-affidavits. Instead of doing so it asks the Court to assume such substantial offset. Nor could this question of fact have been developed by the introduction by the appellants of the record before the Commission. This record did not contain the checks and estimates

referred to in the report order and could not have contained them, since they were checks and estimates based upon the application of the order itself.

(c) THE MANNER IN WHICH THE COMMISSION REVISED THE RELATIONSHIP OF RATES AND REMOVED DISCRIMINATIONS SHOWS THAT IT CONSCIOUSLY AND DELIBERATELY REDUCED THE GENERAL LEVEL OF THE RATES AND THE REVENUES OF THE CARRIERS.

The Commission found that the rates in many parts of the territory were not properly related to each other. For the purpose of determining such relationship it employed as its yardstick the mileage scale of rates prescribed by it as reasonable maximum rates in *Oklahoma Millers League* v. *A. & M. R. R. Co.*, 128 I. C. C. 523, applying between Oklahoma and Louisiana.

This is the Southwestern scale referred to in our opening brief and which had been prescribed during the pendency of the proceedings* as a scale of maximum rea-

*The Commission challenges our use of the so-called *Louisiana* scale (*Oklahoma-Millers League* v. *A. & M. R. R. Co.*, 128 I. C. C. 523, Docket 15026) as a basis of comparison with the rates herein prescribed for application in the Southwest saying that if we had used the so-called *Oklahoma* scale (*Oklahoma Corporation Commission* v. *A. & S. Ry. Co.*, 101 I. C. C. 116), the reduction would not have appeared so great. However, in using this scale as a basis of comparison, we were merely following the Commission's example. (See R. 107-109.) The Commission in its report made the following statement (R. 107, note):

> "It [the 15026 scale] was regarded in view of the method of fixing distances as the substantial equivalent of the scale prescribed in *Oklahoma Corporation Commission* v. *A. & S. Ry. Co.*, 101 I. C. C. 116 (Docket 12244) for application from Oklahoma to Texas."

sonable rates (Opening Brief, pp. 64-65). The Commission in its report uses this as "a convenient yardstick" for measuring the relation of rates throughout the western district as a whole and sets out the result of such comparisons in a table (R. 108-109) in which the rates in various parts of the territory are expressed in percentages of such scale. Having thus measured the relationship of the rates by this yardstick of its own choosing and recent prescription, the Commission in its order proceeds to materially reduce the yardstick itself and along with such reduction to reduce correspondingly the rates which it had measured thereby. The average of the rates prescribed is 20% below what it would have been had the rates been brought to the level of the "yardstick" scale. In every single case the rates prescribed by the Commission are materially lower than would the rates have been had the Commission equated them to the yardstick. This is shown by the table reproduced on the opposite page.

There could be no clearer demonstration that in readjusting the relation of rates, in order to provide a more symmetrical and harmonious rate structure, the Commission consciously and deliberately reduced the general

---

It appears from a comparison of the two scales that there is a difference in the manner in which they are applied, which apparently must be taken into account in determining their effect. The Commission in using the language quoted above was, of course aware of this, and declared that considering the difference in the method of fixing distances the one was the substantial equivalent of the other. In our brief we accepted the Commission's conclusion in this respect, which counsel for the Commission now repudiates.

COMPARISON OF PRESCRIBED RATES WITH RATES WHICH WOULD HAVE BEEN PRESCRIBED IF THE COMMISSION HAD APPLIED ITS YARDSTICK SCALE.

	[1]Page of Record	[2]Ratio Present Rate to 15026 Scale	[3]Present Rate	[4]Present Rate Equated to 15026 Scale	Prescribed Rate
To Chicago from—					
Iowa	252	70.6	19.9	28.1	20.0
Wisconsin	271	67	16.8	25.1	16.7
Oklahoma	263	84	38.9	46.3	35.1
Montana	259	90	52.8	58.6	49.6
Nebraska	260	86.5	33.9	39.2	28.9
Minnesota	256	68.5	23.3	34	24.2
Kansas	254	83	33.2	40	30.7
North Dakota	262	75.5	32.4	42.8	33.9
Eastern South Dakota	267	83	30.4	35.4	28.6
Colorado	247	95	46.3	48.7	42
To Milwaukee from—					
Wisconsin	271	69	13.8	20	14.1
To St. Louis from—					
Oklahoma	264	89	34.1	38.3	29.2
Southeastern Missouri (to St. Louis and Memphis)	258	85	14.0	16.4	14.0
Iowa	253	71	21.3	30	21.1
To Minneapolis from—					
Montana	259	82	41.0	50	38.7
Iowa	253	74	17.9	24.1	17.0
Minnesota	256	63	11.8	18.7	13.2
North Dakota	262	66	20.4	30.9	21.9
Eastern South Dakota	267	75	20.1	26.8	19.2
To Duluth from—					
Montana	259	82	41.0	50.0	38.7
Minnesota	256	70	15.8	22.5	17.3
North Dakota	262	66	20.4	30.9	21.9
To Kansas City from—					
Idaho	249	94	65.7	69.8	59.3
Oklahoma	263	88.5	27.8	31.4	20.2
Panhandle of Texas	268	93	33.6	36.1	27.8
Western Missouri	257	73	12.5	17.1	11.5
Nebraska	261	78	20.9	26.5	18.4
Iowa	253	73.7	18.7	25.3	17.3
Kansas	254	68.5	16.7	24.2	15.8
Colorado	247	87	29.6	34.0	27.7
To Omaha from—					
Idaho	249	94	65.7	69.8	59.3
Nebraska	260	86	17.5	20.3	13.9
Iowa	253	74	13.6	18.3	13
Colorado	247	87	29.6	34.0	27.7
To Sioux City from—					
Eastern South Dakota	268	90	16.4	18.1	14.8
To Memphis from—					
Oklahoma	265	83	31.8	38.3	28.8
Panhandle of Texas	269	89.5	39.6	47.7	38.1
To Galveston from—					
Idaho	249	111	82.5	74.3	69.3
Oklahoma	264	91	32.6	35.8	28.5
Panhandle of Texas	268	82	32.0	39.0	30.9
Kansas	255	110	47.0	42.7	38.4
Colorado	249	115	57.2	49.5	48.1
To New Orleans from—					
Idaho	252	108	85.5	79.1	74.3
Oklahoma	265	100	39.2	39.2	32.5
Panhandle of Texas	269	92.5	41.6	44.8	39.0
Kansas	255	78	48.5	62.1	43.4
Colorado	248	110	60.1	54.6	53.1
To Alexandria from—					
Nebraska to (Arkansas, Louisiana, Oklahoma, Texas)	261	115	54.8	47.9	44
To Seattle from—					
Idaho:					
Southern	252	100	46.3	46.3	37.3
Northern	249	70	26.2	34.8	21.6

[1]Page of Record (Appendix D to Report) on which the corresponding "Present R made by the Supplemental Order of April 10, 1931, have been taken into consider haul has necessarily been omitted.

[2]As shown on R. 108.

[3]By "Present Rates" is meant the rates in effect at the time of the order herein.

[4]This is the rate that would have been fixed if the Commission had readjusted th

EXAMPLE

The first rate shown (from Iowa to Chicago) is used as an example. The present coarse grains from Iowa to Chicago shown in the table R. 252. Said average rate is of the rate that would apply if fixed at the level of the Commission's yardstick scale. yardstick scale, would be 28.1 cents, as shown in the next to the last column of the abov (R. 252).

	[1]Page of Record	[2]Ratio Present Rate to 15026 Scale	[3]Present Rate	[4]Present Rate Equated to 15026 Scale	Prescribed Rate
To Omaha from—					
Idaho	249	94	65.7	69.8	59.3
Nebraska	260	86	17.5	20.3	13.9
Iowa	253	74	13.6	18.3	13
Colorado	247	87	29.6	34.0	27.7
To Sioux City from—					
Eastern South Dakota	268	90	16.4	18.1	14.8
To Memphis from—					
Oklahoma	265	83	31.8	38.3	28.8
Panhandle of Texas	269	89.5	39.6	47.7	38.1
To Galveston from—					
Idaho	249	111	82.5	74.3	69.3
Oklahoma	264	91	32.6	35.8	28.5
Panhandle of Texas	268	82	32.0	39.0	30.9
Kansas	255	110	47.0	42.7	38.4
Colorado	249	115	57.2	49.5	48.1
To New Orleans from—					
Idaho	252	108	85.5	79.1	74.3
Oklahoma	265	100	39.2	39.2	32.5
Panhandle of Texas	269	92.5	41.6	44.8	39.0
Kansas	255	78	48.5	62.1	43.4
Colorado	248	110	60.1	54.6	53.1
To Alexandria from—					
Nebraska to (Arkansas, Louisiana, Oklahoma, Texas)	261	115	54.8	47.9	44
To Seattle from—					
Idaho:					
Southern	252	100	46.3	46.3	37.3
Northern	249	70	26.2	34.8	21.6
Montana	260	84	39.2	46.6	37.8
South of Snake River in Columbia Basin	266	75	20.8	27.7	19.2
North of Snake River in Columbia Basin	249	80	24.9	30.1	21.3
To Oregon-Washington from—					
Colorado	248	98	56	56.1	53
To Portland from—					
Idaho	250	100	43.3	43.3	33.5
Washington, northeastern Oregon, northern Idaho	250	81.7	24.8	30.3	21.3
Oregon Maine-Line points on O. W. R. & N.	266	81.5	20.7	25.4	14
Oregon branch-line points on O. W. R. & N., intrastate	266	94.5	23.1	24.5	17.9
Oregon branch-line points on O. W. R. & N., interstate	266	108	26.6	24.6	18.8
To Arizona from—					
Idaho	251	109.5	67.8	61.9	61.7
Colorado	248	124.5	61.5	49.4	46.3
To New Mexico from—					
Colorado	247	149	57.7	38.7	35.5
To California from—					
Idaho	250	106.5	57	53.5	46
Colorado	248	98	57.7	58.9	51.7
To El Paso from—					
Colorado	247	125	57.7	46.1	35.7

[1]Page of Record (Appendix D to Report) on which the corresponding "Present Rates" and "Prescribed Rates" are given. (Changes in Prescribed Rates made by the Supplemental Order of April 10, 1931, have been taken into consideration. Where the corresponding rates are not shown, the particular haul has necessarily been omitted.

[2]As shown on R. 108.

[3]By "Present Rates" is meant the rates in effect at the time of the order herein.

[4]This is the rate that would have been fixed if the Commission had readjusted the rates to conform to the level of the yardstick scale.

EXAMPLE

The first rate shown (from Iowa to Chicago) is used as an example. The present rate shown in the above table is the average of the rates on wheat and coarse grains from Iowa to Chicago shown in the table R. 252. Said average rate is 19.9 cents. The present rate is shown at p. 658 of the Report to be 70.6% of the rate that would apply if fixed at the level of the Commission's yardstick scale. Accordingly, the 19.9 cent present average rate, if raised to 100% of the yardstick scale, would be 28.1 cents, as shown in the next to the last column of the above table. The average rate actually prescribed by the Commission is 20 cents (R. 252).

level unnecessarily. The briefs of the appellees comment on the fact that the report says:

> "We are confronted with the fact that, judged by the usual standards of transportation conditions, some of the rates in the western district, on both wheat and coarse grains, are too low, while others are too high. Horizontal treatment of such rates would perpetuate these inconsistencies. It follows that proper treatment would leave some of the rates as they are, reduce some, and increase others" (R. 109).

This conclusion follows immediately after the table referred to and is based thereon. Notwithstanding this statement, only eight of the present rates are increased while fifty-six are reduced, in many instances far below the reductions which would result from the use of the yardstick itself as a measure. The reductions average 5.3 cents. The advances, on the other hand, in the eight rates advanced, range from .1c to 1.5c, averaging 1.1c. If instead of doing this it had applied its own yardstick, prescribed as a scale of reasonable maximum rates under the standard of the Interstate Commerce Act during the pendency of this proceeding, it would have preserved the carrier revenues and at the same time established the symmetrical and harmonious rate structure which it was seeking.

In our opening brief we pointed out that when the Commission came to deal with cases of individual discriminations it almost uniformly corrected the same by a reduction in the higher of the offending rates and fre-

quently by reductions in both. That it did so is virtually conceded in the briefs of the appellees.*

The very method employed by the Commission in revising rate relations and removing discriminations, therefore, shows that it consciously and deliberately established a lower general level of rates, into which such revised relationships were fitted, instead of maintaining the existing level and thus preserving the revenues of the carriers.

2. The fact that the report states that the findings are under the Interstate Commerce Act is not, as urged by all the appellees, conclusive that they were based upon a proper conception of the Commission's powers and duties thereunder.

The Commission recognized that the necessary effect of its order was substantially to reduce the revenues of the carriers, despite the inadequacy of their existing return. Clearly, all of the discriminations which the order removes and all of the improper practices which the order corrects could have been accomplished without the prediction of any such result. To review at length, as the briefs of the appellees do, the comprehensive nature of the proceeding, extent of the record, the maladjust-

*For example, the Commission (Br. 62) concedes that prejudice was remedied, as to one group of rates, by materially reducing all rates to Cairo, but states that the Commission's remedying of that situation was not one-sided because many rates from Southeastern Missouri to St. Louis and Memphis were increased. However, the rates to Cairo (which is an important rate-fixing point) were reduced on an average by 3.3 cents, whereas the rates from Southeastern Missouri to St. Louis and Memphis were increased by an average of only 0.8 cents (R. 258, 259).

ments corrected, etc. can be of no possible aid to the Court in determining whether, in making a general reduction in the rates, which the report shows the Commission itself regarded as one of the issues, if not the major issue, the Commission proceeded upon an erroneous conception of its powers and duties.

The argument of all the appellees is that the Commission could not have done so because of the declaration which the report contains that it was proceeding under the Interstate Commerce Act:

> "The Supreme Court of the United States recently interpreted the Hoch-Smith resolution as setting up no standard of reasonableness of rate level or relation other than that already provided by the interstate commerce act, *Ann Arbor Railroad Company* v. *United States*, ... U. S. ..., decided June 2, 1930. The findings herein are under the provisions of the interstate commerce act" (R. 111).

The brief of the Commission itself states:

> "Appellants, as we conceive it, have interpreted the court's decision [in the *Ann Arbor* case] correctly. The Commission's sole function is the administering of the Interstate Commerce Act and related Acts as interpreted by this Court when such interpretations have been made. Because of its prior misconception of the law, the Commission in this case gave express notice that it was following the teaching of the court in the then recently announced decision in the *Deciduous Fruit* case" (Brief, p. 65).

The declaration relied on was, of course, inserted in the report after the decision in the *Ann Arbor* case. What

other changes, if any, were made either in the report or the order does not appear.

In the foregoing excerpt from the Commission's brief, it naïvely suggests that because, in such declaration, the Commission gave express notice to this Court, among others, that it was following its teaching in the *Ann Arbor* case, it must have properly interpreted the same and could have committed no error. Judicial review may not be avoided by any such "express notice" to the Court or by any such self-serving declaration.

The Commission in its brief also says:

> "* * * The need for the statement by the Commission that it was following the teaching of the court arose from the very fact that it had theretofore given to the resolution an interpretation different from that of the court" (p. 32).

This is equivalent to saying that but for this statement the Court would be justified in holding that the order was based upon a misinterpretation of the resolution and of its effect upon the powers and duties of the Commission. If for this reason there was "need" of such statement, it would seem that there was equal "need" for a statement of what the Commission's then conception of the effect of the resolution upon its powers and duties was. Obviously, a mere statement that the Commission's findings were made under the Interstate Commerce Act was not in itself sufficient to obviate a conclusion, which, counsel in effect says might otherwise have been drawn from the report, *viz.*: that they were based upon a misconception of its powers and duties thereunder.

Moreover, Commissioner Eastman in his concurring opinion, although stating that the Commission was proceeding under the Interstate Commerce Act, in that the Act empowered it to establish the lowest possible lawful rates on any description of traffic, also stated that the resolution made it its duty to do so in this case. This interpretation was the interpretation originally placed upon the resolution by the Commission itself in *Grain and Grain Products*, 122 I. C. C. 235, but departed from in the order set aside in the *Ann Arbor* case, in that the Commission there used standards other than those of the Interstate Commerce Act in determining what the lowest possible lawful rates were.

If, therefore, as the Commission's brief says, there was "need" for the statement which the report contained, that need would appear to extend to a repudiation of the interpretation originally placed upon the resolution by the Commission and restated by Commissioner Eastman in his concurring opinion. This "need" would seem to have been all the greater since, as will appear from the review to be hereinafter made of the other concurring opinions, all of the eight Commissioners filing concurring opinions, constituting more than a majority of the Commission, appear to have been possessed of the same or a substantially similar conception of the effect of the resolution upon the duties, if not the powers, of the Commission.

Indeed, when the statement relied upon is read in the light of these opinions, it is evident that the "need" was never satisfied.

It is also significant that the Commission nowhere in its brief states what its present conception of its

powers and duties under the third paragraph of the resolution is, and nowhere states that the view expressed by Commissioner Eastman, and as we believe, implicit in all the concurring opinions, is erroneous, or other than its own. On the contrary, it says (Commission's Brief, p. 20) that we have given "a strained implication" to the language of the concurring Commissioners. On page 33 of its brief the Commission says:

> "Moreover the lower court was unable to conclude that any words in said separate opinions had reference to other than lawful rates as defined in the *Deciduous Fruit Case.*"

With this conclusion of the Court below the Commission apparently concurs, although it does not say so specifically. The interpretation which we have placed upon the language contained in the concurring opinions is not a strained interpretation. It is based upon their express and unequivocal language. If by this reference to the conclusion of the Court below the Commission means to say that there is nothing in those opinions, and particularly that of Commissioner Eastman, which is in conflict with the law, then it means to say that, as stated by the Commissioner, the resolution made it the duty of the Commission to establish on agricultural products affected by depression the lowest possible lawful rates compatible with the maintenance of an adequate transportation system. If so, then the Commission was not exercising its independent judgment, but proceeding because of a duty supposed to be imposed upon it by the resolution. The resolution may have imposed such a duty. We do not think it did. If it did not, then, despite the decision

of the court below, the language employed in the concurring opinions was in conflict with the law and with the decision of this Court in the *Ann Arbor* case. Unless, by thus directing attention to the opinion of the Court below, the Commission meant to assert that there was no conflict, there was no occasion to have referred to it.

The failure of the Commission in its brief, as well as in its report, to repudiate or qualify the statements contained in the concurring opinions, including that of Mr. Eastman is, we think, highly significant. Equally significant is the failure of the Commission to state plainly in its brief what it now conceives to be the effect of the resolution (since the decision in the *Ann Arbor* case), upon its duties, if not upon its powers. Instead of so doing the Commission apparently prefers to rely upon the "express notice" given to this Court, that it followed its teachings, without enlightening the Court as to what it conceives such teachings to have been. It thus would preclude judicial review of its action by an ambiguous self-serving declaration contained in its report, accompanied by complete silence even now as to what it meant.

3. It appears from the separate opinions of concurring Commissioners constituting a majority of the Commission, that the action of the Commission was taken in response to a supposed duty to attempt to relieve the condition of agriculture by reduction in rates, irrespective of the requirements of Sec. 15a, provided only the Commission was of the opinion that such reductions would not spell immediate disaster to the carriers.

It is also significant that while other briefs argue that Commissioner Eastman was expressing his own

views only, the brief of the Commission does not. Apparently, although the Commission was without sufficient courage to adopt and defend Mr. Eastman's interpretation, it also felt itself precluded from repudiating it, obviously, as we think, because it represented the Commission's own conception of its powers and duties.

We shall not repeat the facts and considerations set forth in our opening brief, from which we think it appears that Commissioner Eastman's opinion is not only not inconsistent with the main report but that it is the only conception of power and duty consistent therewith.

But certain it is that it did not represent his views alone. On the contrary, the remaining concurring opinions show that his was likewise the conception of their authors, constituting in themselves a majority of the Commission.

Commissioner Woodlock, after referring to "the extremely low level of the rates here prescribed" (R. 186), concludes that that level is in fact too low:

> "My main difficulty with the report is the level of the rates prescribed. They are, in my judgment, far too low. They will involve a reduction of at least $15,000,000 in the revenues of carriers in the western district—perhaps more * * * If the rates herein prescribed are to remain long in effect in this territory, I can not but feel that they will produce a situation which will require emergency remedies if we are to maintain in that territory 'an adequate system of transportation'" (R. 187).

Commissioner Lewis refers to the "cuts of 20, 30, 40, 50, or even 60 per cent. in the present rates," and states that in his judgment "some of the carriers are not at this time in a position to stand such reductions" (R. 182). Yet he votes with the other Commissioners, as did Commissioner Woodlock who thought the prescribed rates "far too low" and Commissioner Eastman who thought that "less severe" rates should have been prescribed. Why then did they vote for the reductions? It is evident that they were acting under a supposed duty to effect a reduction on agricultural rates in this proceeding, and that regardless of Section 15a, whose mandate might be obeyed in some later and different case. Thus, Commissioner Eastman said that:

> "Our duty under section 15a is to be performed in the exercise of our power 'to prescribe just and reasonable rates,' and those words in turn are to be read in the light of the Hoch-Smith resolution. Our *duty in this proceeding,* as I see it, is to prescribe rates on grain and grain products designed, on the evidence before us, to cover the cost of handling that traffic plus a substantial margin of profit, although not as large a margin as might be reasonable in the case of certain other forms of traffic. It will, however, *remain our duty* under Section 15a to see to it that the carriers have a general body of rates sufficient to produce, 'as nearly as may be,' the fair return stipulated by that section" (R. 172). (Italics ours.)

Commissioner Lewis's language is to a similar effect:

> "The best argument that is made in behalf of the decision herein is that it creates more equi-

table rate structure which will lend itself to horizontal adjustments up or down. This carries to me intimation that the level herein prescribed is probably too low to be permanent" (R. 186).

Commissioner Woodlock foresaw the same necessity of future action:

> "But for the other advantages of the report and but for one fact with respect to the new rate structure that structure would, in my opinion, constitute a fatal defect which would prevent me from even a partial concurrence in the report as a whole. But one advantage of the structure herein prescribed is that it will be susceptible of *horizontal change* without much risk of such change producing new and widespread discriminations so that its rectification when such rectification shall be shown to be *necessary* should not be a matter of great difficulty." (R. 187; italics ours.)

Commissioner Meyer, the Commissioner in charge of the case throughout, characterized the rates prescribed as the lowest rates which can be lawfully prescribed. This is only another way of saying that they were prescribed as the lowest possible lawful rates, by whatever standards such rates are to be measured.

> "The rates prescribed lie within the zone of reasonableness, but they are the lowest rates on this traffic which can be lawfully prescribed" (R. 150).

"We are establishing herein rates as low as we can lawfully prescribe" (R. 153).*

Here, therefore, are four Commissioners who obviously concurred in the order upon the theory that, despite the requirements of Sec. 15a, they were for some reason required to reduce the rates on agricultural products and establish the lowest possible rates thereon. Such a duty could only have arisen under the assumption that the resolution required it.

Commissioner Porter, although concurring in the report, complained that sufficient relief had not been accorded to the coarse grain farmer, as required by the resolution. Commissioner Porter was thus affected by his conception of what the resolution required the Commission to do. That he thought that, despite the decision in the *Ann Arbor* case, it made it the duty of the Commission to establish the lowest possible lawful rates on agricultural products affected by depression, is made perfectly plain by a subsequent dissenting opinion by the same Commissioner in another case (*Refined Petroleum Products in the Southwest,* 171 I. C. C. 381, 453), in which he said:

"Congress, in the Hoch-Smith resolution, has plainly directed that we should afford the products of agriculture the lowest possible lawful rates. True, the Supreme Court has recently held that

*The Commission suggests that this last statement of Commissioner Meyer is confined to export rates. We can only say that we do not believe that a fair reading of this statement taken in its entire context will support the construction given to it by counsel for the Commission.

that resolution did not 'purport to make any change in the existing law, but on the contrary requires that that law be given effect,' *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658, but the direction of Congress still stands, and it is our duty faithfully to carry out the mandate, as near as may be, under the authority we do possess. This we have, in part, done recently within the very rate territory here involved, and in the *Grain Case*, 164 I. C. C. 619, have made reductions that will cost the carriers in southwestern territory several millions of dollars. * * *"

Commissioner Aitchison, although concurring, agreed with Commissioner Porter that the Commission had not made the rates on coarse grains low enough and, as he said, for the reasons stated in Commissioner Porter's opinion (R. 195). The reasons stated in Commissioner Porter's opinion was that the Commission had not performed its full duty under the resolution in respect of such rates:

"The utter disregard of the just claims of the coarse-grain farmers to relief by reduced freight rates, as compared with the substantial reduction in rates generally accorded the wheat farmer, is striking" (R. 191).

"The distressed condition of agriculture, quite fully described in an appendix to this report, unquestionably applies with as much force to the farmer who is producing coarse grains as to the farmer who is engaged in producing wheat exclusively. This proceeding is an outgrowth of the Hoch-Smith resolution, and surely Congress when it passed that resolution admonishing the commission to afford all possible relief to the farmer

meant the coarse-grain farmer just as much as it meant the wheat farmer" (R. 192).

Commissioner McManamy said that if a transit charge were added (which was not done), the rates could be reduced, and the revenues of the carriers protected, which he understood to be the object of the proceeding:

> "With a reasonable charge for this so-called free service it would be possible to give the actual grower of grain lower rates without depleting the carriers' revenues and that I understand to be the *primary object sought in this proceeding*" (R. 149; italics ours).

Seven out of eleven Commissioners, each of whom filed a separate concurring opinion, were thus obviously of the view that the Commission was required to attempt to relieve the condition of agriculture by a reduction in the rates on its products. No such duty is imposed by the Interstate Commerce Act. Any such view must have been based upon the supposed effect of the third paragraph of the resolution. On the other hand, it appears from the report that the carriers' rate of return was far below the statutory standard. It thus appears from these concurring opinions, whose authors constitute more than a majority of the Commission, that the Commission felt that its duty to attempt to relieve the condition of agriculture was so imperative that it was required to reduce the rates, notwithstanding the existing inadequacy of the carriers' rate of return, provided only it was of the opinion that such reductions would not spell immediate disaster to the carriers.

To these seven, we think, should be added Commissioner Brainerd, who said:

> "I favor * * a *lesser reduction* in the proportional rates and a *greater reduction* in the rates from country stations to the markets * * *". (R. 188; italics ours.)

He evidently recognized the duty to reduce; and the sole question in his mind was as to how the reductions should be apportioned. With Commissioner Brainerd added, all eight Commissioners filing concurring opinions are accounted for.

It is said in some of the answering briefs that Commissioner Eastman's views are to be taken to be his own only, but here we have seven other Commissioners filing concurring opinions, from which it appears that they likewise were proceeding upon the theory that it was the duty of the Commission to establish the lowest possible lawful rates on agricultural products affected by depression and by reason of that depression. Such a conception of a duty must have been based only upon the resolution. No Commissioner, whether filing a concurring opinion or joining in those of others, dissented from the views expressed by Mr. Eastman. They are, moreover, not only the views expressed by the Commission in its original interpretation of the resolution, but wholly consistent with the main report itself. Indeed, we believe that the review made of the report clearly demonstrates that it is the only rational view upon which the action can be sustained.

4. The Commission's misconception and disregard of Section 15a.

(a) NONE OF THE APPELLEES' BRIEFS DENY THAT THE CARRIERS' RATE OF RETURN WAS AND FOR MANY YEARS HAD BEEN BELOW THE STATUTORY STANDARD.

This is not denied in any of the briefs. In view of the facts recited in the report, and of the Commission's statement to Congress quoted in the bill (R. 12), that the carriers had never since the passage of the Transportation Act achieved the fair rate of return contemplated thereby, it is not capable of denial.

(b) WHETHER THE RATES PRESCRIBED WERE THE LOWEST POSSIBLE LAWFUL RATES OR NOT, IT APPEARS ON THE FACE OF THE REPORT AND INDEPENDENTLY OF THE CONCURRING OPINIONS OR OF ANY OTHER CONSIDERATION, THAT THE ORDER WAS BASED UPON A MISCONCEPTION OF THE POWERS AND DUTIES OF THE COMMISSION UNDER SEC. 15A.

In one respect the briefs in this Court differ from those presented by the appellees below. In that Court all the appellees, including the Commission, stoutly contended that the Commission was not required in this case to give any consideration to Sec. 15a whatsoever. So successful was their contention that they induced the District Court to adopt it (R. 703). That contention has now apparently been abandoned. At least it is not

renewed in any of the briefs and the Commission in its brief expressly states (p. 25) that consideration also had to be given to the provisions of Sec. 15a. In so doing the Commission was, of course, required to construe said section properly and to give proper effect thereto.

In our opening brief we said that if in its reference to Sec. 15a the Commission meant to construe it as permissive, it clearly misconstrued it. We also pointed out that when the Commission said that its order was fully responsive to all mandates of the law because, despite the substantial revenue effects of the order, it was satisfied that it would not threaten the maintenance of an adequate system of transportation, if it intended to say that the adequacy of carrier revenues under Sec. 15a was to be measured by merely determining whether they were so low as to threaten the maintenance of an adequate system of transportation instead of by the requirements of Sec. 15a as written, the Commission misconstrued both the plain language and the purpose of that section. We also said in effect, if not directly, that we did not believe that the Commission intended either construction, but that we believed that the Commission's disregard of Sec. 15a was based upon the theory that the Commission was discharged from a consideration thereof in this proceeding by reason of the resolution, although it might be required later on to give consideration thereto. The Commission does not like the explanation offered of its action. It says it could not possibly have placed such a construction upon the resolution.

But if such be not the explanation, then it conclusively appears from the report that the Commission,

whatever the reason, did misconstrue and misapply Sec. 15a.

If, as correctly stated in the Commission's brief, the Commission had to consider that section, it had to consider that section and its requirements as enacted by Congress. That it did consider the revenue effects of the order appears on the face of the report. The only provision of the Act which requires the Commission to consider the revenue effects of its action upon the carriers as a whole is Sec. 15a. Under that section the Commission is required to measure the sufficiency of such revenues and the resulting effect upon the maintenance of an adequate system of transportation by the relation of such revenues to a fair rate of return, to be determined by the Commission, and which the Commission had determined to be 5.75%. Instead of so measuring the revenue effects, the Commission measured them by a consideration of whether or not the reductions required would in its opinion threaten the maintenance of an adequate system of transportation.

The duty imposed by Sec. 15a is not merely to avoid making rates which constitute a threat to the maintenance of an adequate system of transportation, but to provide a structure which will produce, as nearly as may be, a fair return. The Commission thus failed to measure the revenue effects of the order by the standard of Sec. 15a, but measured them by a different standard wholly unwarranted thereby and inconsistent therewith. It could not have measured such revenue effects by the statutory standard, for if it had, it would have been bound to hold that the resulting revenue losses would reduce a rate of

return already inadequate under the standards of such section.

(c) THE RELATION OF THE ALLEGED PREVENTION OF WASTEFUL PRACTICES AND OF INCREASED REVENUES SUPPOSED TO RESULT FROM OTHER CASES TO THE COMMISSION'S MISINTERPRETATION OF SEC. 15A.

As we have stated, all the briefs stress the fact that some rates were advanced, that the transit rules were amended and the application of transit restricted and that certain wasteful practices with respect to the use of transit, such as out of line and back line hauls, were prohibited. From this is is argued inferentially, if not directly, that the Commission was concerned with and sought to protect the revenues of the carriers. But the net result, as appears from the report itself, was to reduce them. It was this net result that the Commission measured by the standard which it had substituted for that of Sec. 15a, and which, as we believe, was supposed to have its origin in the resolution. Assuming, without conceding, that by reason of these other provisions of the order the Commission might have reduced the rates somewhat, it clearly was without authority to reduce them to the extent that it did, and clearly without authority so to do if its action was based upon the substituted standard above described.

It is true that the resolution directed the Commission to review the entire rate structure for the purpose of bringing the same into harmony with all provisions of the Interstate Commerce Act. In so doing the Commission was required to give effect to Sec. 3, prohibiting the

removal of unjust discrimination. It was required to give effect to Sec. 1, subject to the limitations imposed thereon by Sec. 15a. It was equally required to give consideration to Sec. 15a. Any general rate proceeding which does not include the object of bringing the rate structure up to a point which will produce, as nearly as may be, a fair return upon the value of the property, is one which disregards one of the most fundamental provisions of the Act.

The carriers had never, since the passage of the Transportation Act, received that rate of return. If their failure so to do was because of certain wasteful practices uncovered in the general rate structure investigation, it was the duty of the Commission to require them to be stopped. The money saved would thus add to carrier revenues and increase the rate of return without increasing the rates. Certainly there was no duty on the part of the Commission under such circumstances to reduce the rates as well, and no power so to do through the establishment of lowest possible lawful rates, whether, as stated in the brief of the Commission, the new rates covered more or less service than before. If the object of the Commission in the general rate structure investigation of which this was a part, was to take away from the carriers through rate reductions everything saved through a correction of practices, then it was most certainly proceeding with such investigation under a wholly erroneous conception either of its duties under Sec. 15a or of the relation of Sec. 15a to such proceeding.

The same observations apply to the Commission's statement that its conclusion that the readjustment or-

dered will not threaten the maintenance of an adequate system of transportation is based in part upon increased revenues supposed to result from other cases. We say "supposed to result" because there was nothing of record indicating either the existence of such increases or their extent, and because the Commission, by denying the carriers' second petition for rehearing, refused to hear and consider any evidence whatsoever with relation thereto. Neither does the report of the Commission state the relation between such supposed increases and the losses resulting from this order. Assuming, contrary to the unchallenged allegation in the petition for rehearing (R. 533-534), repeated in the bill (R. 38), that they exactly offset each other, the fact still remains that the Commission was measuring the net result not by the standard of Sec. 15a but by considering whether, in its opinion, the maintenance of an adequate system of transportation would be threatened. In other words, the Commission by its own statement measured the adequacy of carrier revenues by a theory under which the Commission, instead of performing a duty to provide, as nearly as might be, a rate structure which would produce a fair rate of return, was privileged to establish any structure which it saw fit, provided only it was of the opinion that it did not spell immediate disaster to the carriers. That it felt so privileged is in itself the best evidence that the Commission believed that it was empowered to establish the lowest possible rates on the traffic involved. But whether such was its view or not, its order is shown upon the face of the report, without regard to any other considerations whatsoever, to have been predicated upon a

clear misconception of the requirements of Sec. 15a as applied to this case.

(d) THE COMMISSION DID NOT AND COULD NOT FIND THAT TRAFFIC WAS DIMINISHING UNDER THE EXISTING RATES OR THAT A REDUCTION IN THE GENERAL LEVEL OF RATES WOULD RESULT IN INCREASED TRAFFIC.

There is considerable discussion in appellees' briefs of the recent *Fifteen Per Cent case* (*Ex Parte 103*), 178 I. C. C. 539, and in particular of the position taken by the Commission in that case that its function in applying Section 15a was not that of a mere mathematical computor, but required it to have in mind *the actual revenue result* of its action. That is to say, the Commission could deny a general rate increase, notwithstanding existing inadequacy of return, if it found as a fact in the exercise of its judgment that such increase in rates would result in a decrease of traffic of such proportions as to bring about an actual decrease, rather than increase, of revenues.

Appellants are not here to dispute the soundness of this position. In this case, the Commission did *not* do what it did in the *Fifteen Per Cent case*. It did *not* find in this case (either formally or informally) that the reduction in the general level of rates which it was imposing would result in greater traffic and greater revenues. Nor did it find that traffic and revenues had fallen off under the existing rates.

When the carriers alleged and offered to prove in their petition for rehearing that grain was continuing to move

in unreduced volume and would continue so to do (R. 528), the Commission declined to take any proof on this question. In support of their allegation the carriers set forth in their petition for rehearing the authentic statistics of the American Railroad Association. The Commission had no reason to doubt their accuracy. In denying the petition the Commission thus foreclosed any possible argument that the reductions were designed to prevent a diminution of traffic.

(e) THE COMMISSION'S ARGUMENT THAT IT PERFORMED ITS DUTY UNDER SECTION 15A IN THE EARLIER GRAIN CASES, ITSELF POINTS THE CONTRAST WITH THE PRESENT CASE, IN WHICH THE COMMISSION DISREGARDED THAT DUTY.

The Commission's counsel later take the position that the Commission has in fact performed its duty under Section 15a in other cases (Brief, p. 72). For this, they refer to *Increased Rates, 1920,* and *Reduced Rates, 1922,* considered above, and to the two earlier Western Grain cases, the reports in which are contained in the record (*Public Utilities Commission of Kansas* v. *A. T. & S. F. Ry. Co.*, R. 327-339; *Rates and Charges on Grain and Grain Products,* R. 341-420). This is precisely our point: The Commission still acted with due regard to Section 15a in those two Grain cases. But that very fact points the contrast with its improper action in this case. In the *Kansas Public Utilities* case and in *Rates and Charges on Grain and Grain Products,* the Commission denied requested reductions in the general level of grain

rates in the Western Group, upon the finding, among others, that the carriers had not earned and were not earning a fair return (R. 13, 15).

It is the utter lack of any contrary findings in the present case, which (taken with all the other circumstances in the case) show that the Commission was here acting under a misconstruction of its power and duties, in striking contrast with the correct construction of its powers and duties evidenced in the prior cases.

(f) THE COMMISSION'S MISCONSTRUCTION OF SECTION 15A IS CONCLUSIVELY ESTABLISHED BY ITS ACTION IN REGARD TO THE CARRIERS' PETITIONS FOR REHEARING.

The misconstruction of Section 15a is finally and conclusively established by the Commission's attitude on the Petitions for Rehearing. The Commission's answer to our argument on this point is wide of the mark. Its counsel state that (Brief, p. 82):

> "Unquestionably, reopening [of the proceedings] would have meant further lengthy proceedings, since the very condition of *diminishing traffic* would have been used in evidence and argument against a higher level of rate." (Italics ours.)

But the key fact on this head of the case is that the carriers showed to the Commission and offered to prove that, notwithstanding the depression, the grain traffic had *not* diminished (R. 528), and in fact, that this was the only major description of traffic which had not diminished. The Commission's argument is based upon the assumption of diminishing traffic. The assumption is

false, and the argument accordingly turns against its maker.

It is assumed throughout the briefs for appellees that the Commission would be justified in reducing the grain rates, notwithstanding that the carriers were not earning a fair return, provided only that the Commission believed that the maintenance of the existing rates would diminish traffic. In this case, the carriers actually showed the Commission that the existing rates had not diminished traffic, notwithstanding the existence of a nation-wide depression and an accompanying diminution in all other classes of traffic.

We are at a loss to see any other possible construction that can be placed upon this action of the Commission other than that

> (*a*) either the Commission believed that it must give effect to a supposed mandate of the Hoch-Smith Resolution to reduce rates notwithstanding Section 15a,
>
> (*b*) or the Commission acted in a high-handed and arbitrary manner, having regard, in the language of Mr. Chief Justice White in the *Illinois Central* case (215 U. S. 452, 470), to the shadow and not the substance. The shadow upon which the Commission relies to protect it in this case is its ultimate finding that the existing rates were unreasonable under the provisions of the Interstate Commerce Act. On this record, the substance behind the shadow is evident: That the Commission was acting under a supposed duty to

make the grain rates the lowest rates that it could lawfully prescribe, and accordingly to reduce the general level of the grain rates below a level on which the traffic was already moving freely.

(g) THE COMMISSION'S BRIEF, IN GIVING AN EXPLANATION FOR THE MISCONSTRUCTION OF SECTION 15A, AGAIN CONFIRMS THAT SUCH MISCONSTRUCTION EXISTED.

The Commission's own brief in this Court in effect admits that the Commission misconstrued and did not attempt to apply Section 15a to this case. At page 67 of their brief, the Commission's attorneys give the *explanation* why the Commission construed Section 15a as a mere permission to the carriers to earn a fair return. This construction, we are told, was the result of the Commission's experience in the case of *Increased Rates, 1920*, 58 I. C. C. 220. In other words, the Commission did not construe the act upon the basis of the language and intent of Congress, but construed the act upon the basis of its own experience in its application.

The Commission does not deny that its construction of the statute as a mere permission failed to give full effect to the language and intent of Congress; instead it explains why it adopted that construction. In effect, the Commission says that it gave Section 15a one trial in 1920, and that the results of that trial being unsatisfactory it determined thereafter to construe the Section as a mere permission. In any even the explanation is

irrelevant;* the misinterpretation alone is enough to condemn the decision which was based upon it. Having explained why the Commission lost faith in Section 15a, as written, and concluded to construe it as a mere permission, the Commission's counsel developed a theory upon which to support that construction. Their theory is that because the Commission's duties under Section 15a are to be performed in the exercise of its power to prescribe just and reasonable rates (Brief, p. 71), the mere finding that the prescribed rates are just and reasonable disposes of Section 15a along with Sections 1 and 15(1). This simply amounts to shelving Section

*If it were important to consider whether the Commission's explanation of its misinterpretation of law is based upon adequate experience in practice to show that the law was in fact unwise, we think that this record would itself show that the Commission has never given Section 15a an adequate trial, and that it abandoned that section too early. Its counsel tells us that it based this construction of the section upon its experience of 1920 and 1921. Traffic then fell. It is common knowledge that that was a period of depression. Traffic having fallen during that period of depression, the Commission in 1922 held a further proceeding and cut the increases in rates that it had granted in 1920. Since then, it has never given effect to Section 15a in any proceeding dealing with the general level of rates. This is not surprising, as its counsel tell us that it reached the conclusion that such attempt would be ineffective. But it is evident that the time at which such an attempt might have been successful would have been a time of prosperity, *i.e.* a time during which traffic would presumably be free to move notwithstanding increased rates. Broadly speaking a period of national prosperity was enjoyed between the years from 1924 to 1929; yet, during those years the carriers' revenues never provided them with a fair return (R. 77 516-518). There is, of course, no issue here as to whether the Commission should have so raised the rates in the Western District during this period as to provide the carriers with a fair return. We merely point out that this would have been an opportunity for the Commission to have given Section 15a a trial during a period presumptively favorable to the success of the trial.

15a in favor of the pre-existing standard of "just and reasonable" rates. It amounts to saying that the Commission will never be required to account for its stewardship of Section 15a, because whenever the question is raised, it can make the simple answer, "We have found the just and reasonable, non-discriminatory rates".

To sustain the Commission's position in this case, is in effect to write Section 15a out of the act.

(h) THE ARGUMENT IN THE COMMISSION'S BRIEF THAT THE ULTIMATE FINDING IS SUFFICIENT BECAUSE THE COMMISSION'S DUTIES UNDER SECTION 15A ARE TO BE PERFORMED IN THE EXERCISE OF ITS POWER TO FIX JUST AND REASONABLE RATES, IS BASED ON A MISCONSTRUCTION OF SECTION 15A, WHICH PROVIDES THAT THE COMMISSION SHALL SO ADJUST THE JUST AND REASONABLE RATES THEMSELVES AS TO PROVIDE THE NECESSARY FAIR RETURN.

The rates prescribed were characterized by the Commissioner in charge of the case as the lowest rates which could be lawfully prescribed. That such was the purpose of the Commission appears from the foregoing review of the eight concurring opinions. It is further substantiated by consideration of the extent and severity of the reductions ordered. That the rates were properly so characterized is not denied by the Commission in its brief. In our opening brief we urged that the Commission was without authority to establish the lowest possible lawful rates at a time when the carriers' rate of return was inadequate and thus to deprive the carriers

pro tanto of the opportunity to earn a fair rate of return under rates which, although higher, would fall within the flexible limits of the Commission's discretion and within the zone of reasonableness.

In order to meet this argument the Commission in its brief repudiates the zone of reasonableness and flexible limits theory entirely and makes the assertion that "when the Commission reaches its determination as to what is the reasonable rate", after considering all factors which it is privileged to consider, "that and none other is the reasonable rate" (Commission's Brief, p. 65). In other words, in order to meet the arguments made, the Commission now takes the view that there is but one absolute rate which meets the standards of Sections 1 and 15, and that that rate is the rate which the Commission fixes and that there may be no other rate which would meet such standard. This is an entire repudiation of the flexible limits and the zone of reasonableness theory previously put forward by the Commission. It is directly contrary to the provisions of Sec. 15 (1) itself, which permits the Commission to fix either a maximum rate, an absolute rate or a minimum rate. It is directly contrary to the decision of this Court in *American Express Company* v. *Caldwell,* 244 U. S. 617, 624 in which the Court accepted the Commission's zone of reasonableness theory and said that there might at the same time be more than one rate within such zone and hence reasonable, by reason whereof an order for the removal of undue discrimination might be made either by an advance in the one or a reduction in the other. In *Grain and Grain Products,* 122 I. C. C. 235, the Commission had

recognized the existence of a lowest possible lawful rate defined by it as being the lowest rate falling within the limits of its flexible discretion.

There is nothing in the report which indicates that the Commission had at the time the report was made changed its mind.* If so, it would clearly have erred by reason of the fact that there is obviously such a zone of reasonableness and there are obviously such flexible limits to the Commission's discretion. As pointed out in our opening brief, the purpose of Sec. 15a was to require the Commission to exercise such discretion so far as necessary to bring about out of all rates made thereunder a fair rate of return as nearly as might be. That such was its purpose would appear to be self-evident.

In order to avoid the consequences of this argument, the Commission is thus required to take the extreme position that there is never but one rate which, if made, would meet the standards of Sec. 1, and that that is the rate which the Commission fixes. We have never contended that the Commission may not reduce a rate clearly unreasonable under the standards of Sec. 1 because not within the zone of reasonableness, irrespective of the carriers' rate of return. We have said that in determining this question and also in fixing the rate for the future, the Commission must have regard to the requirements of Sec. 15a and exercise its discretion so as to carry out, as nearly as may be, the purposes of that

---

*On the contrary Commissioner Meyer, who had had charge of the case, expressly recognized the zone of reasonableness by saying that "The rates prescribed lie within the zone of reasonableness but they are the lowest rates on this traffic which can be lawfully prescribed" (R. 150).

section. The Commission now says that no such duty rests upon it, not because it would not if the zone of reasonableness theory were applied, but because there is no such thing as a zone of reasonableness to be considered.

And the very language of Section 15a defeats the theory that there is no zone of reasonableness. That language is that the Commission SHALL, in the exercise of its power to prescribe just and reasonable rates, so initiate, modify, establish or adjust SUCH rates (i.e. just and reasonable rates) as to provide the fair return. But if there is only one possible just and reasonable rate, how can it be adjusted? How indeed can it be modified?

It is hard to conceive of clearer language in a statute. It instructs as to the duty: to provide the carriers as nearly as may be with the rate of return to be determined by the Commission as fair for such purpose (now 5.75%). It instructs as to the time when the duty is to be performed: *in* the exercise of the power to fix rates, i.e. in cases just like the present. It instructs as to the method: By taking rates (either previously unjust or unreasonable *or previously just and reasonable*) and so modifying and adjusting THEM as to provide the fair return. Finally, it instructs as to the seriousness of the duty: The Commission SHALL obey it.

The Commission has not obeyed it in this case. It has sought to construe it away,—as a mere permission, as a mere incident of the duty under Section 15(1), as satisfied if the maintenance of an adequate system of transportation is not actually threatened. All are inadequate to mitigate the Congressional mandate or to justify its being ignored.

5. Appellees have completely failed to meet the point that the Commission erred in considering decisions of other cases which were not in the record.

Appellants' point that the Commission erred in taking into consideration factors outside the record was not made frivolously or as a mere make-weight. Under the decisions of this Court referred to in our main brief (*Interstate Commerce Commission* v. *Louisville & Nashville Railway Co.*, 227 U. S. 88, 93; *U. S.* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, 289), an administrative commission can act only upon the record before it. Otherwise, of course, the constitutional requirement of a notice and a hearing would be rendered nugatory. Even if we assume that in this case the influence of the particular matters considered outside the record may have been disproportionately small to the magnitude of the issues involved, we cannot believe that such a consideration would constitute a defense for the Commission's action. A disregard of constitutional rights may not be defended upon the ground of the slightness of the offense.

Yet in this case, it is by no means clear that the material which was considered off the record may not have been of compelling importance. The language of the Commission at the conclusion of its report was that

> "It follows that the revenue effects of the increases and decreases which will follow the effectiveness of our action herein can not be precisely stated. We have made many different *checks and estimates*. While the reductions far exceed the increases, and the corresponding revenue effects will be substantial, the full effect upon revenues

> can not be adequately foretold, in view of the limitations upon transit, the elimination of transit balances outbound from primary markets, and the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates. We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation. We say this *especially* in the light of increased revenues already granted in certain other cases, and in the realization that a failure of the present revision to afford adequate revenues will prompt further proceedings" (R. 147-148; italics ours).

The Commission here stated that it based its conclusion upon at least two considerations not within the record:

> (a) Increased revenues already granted in certain other cases; and
>
> (b) Many different checks and estimates of the revenue effects of its order.

(a) THE COMMISSION ACTED "ESPECIALLY" IN THE LIGHT OF INCREASED REVENUES PRESUMED TO HAVE BEEN GRANTED IN CERTAIN OTHER CASES, NEITHER THE REPORTS NOR THE ORDERS IN WHICH CASES WERE IN THE RECORD.

The Commission made its determination on the vital point as to whether the reduction in the rate level would threaten the maintenance of an adequate system of transportation, "in the light of increased revenues granted in certain other cases." To this, the Commission's answer in its brief is that it "did not divorce its mind of the fact

that those increases had been made" (Brief, p. 80). But the injustice to the carriers did not arise from the mere human fact that the Commission did not divorce its mind from these considerations, but from the fact that it affirmatively relied upon them in reaching its determination upon the question as to whether an adequate transportation service would be maintained. Surely, it is as much the Commission's duty to confine the grounds of its decision to facts of record in cases dealing with the maintenance of the adequacy of transportation service, as in any other type of case.

As pointed out in our main brief (pp. 151-152), this was evidently a reference to the *Class Rate case*, another part of the *Rate Structure Investigation*,—a case which was decided May 6, 1930, ten months after this case was submitted and over eighteen months after the close of the record. Obviously, the carriers had no chance to consider or cross-examine any evidence as to the decision in that case or its effect on their revenues. Whether or not the Commission is right in its assumption that the revenues would be increased, is entirely irrelevant. The vice lies in the fact that the Commission's conclusion that the reduction in the general rate level ordered in this case would not "threaten the maintenance of an adequate system of transportation" was based on a consideration of the presumed revenue increases resulting from the *Class Rate case*, a case which could not possibly have been in the record.

Indeed, it appears in the record that the carriers were prepared to prove, and actually offered to the Commission in a petition for rehearing to prove, that the expectation

of revenue increases from the *Class Rate* case was exaggerated, if not unfounded (R. 534).

Moreover, it appears of record before this Court that no other cases were in the record before the Commission. This appears in the affidavits of A. B. Enoch and R. S. Outlaw, both attorneys who attended the proceedings throughout before the Commission (R. 655, 656). The statements in these affidavits that "the said record does not show or contain any evidence of increased revenues granted in certain other cases nor does it show that the revenues had been increased in certain other cases" and "that no evidence of increased revenues granted in other cases was incorporated in said record," are not controverted, and no counter affidavits were filed.

(b) THE CONSIDERATION BY THE COMMISSION OF MANY DIFFERENT CHECKS AND ESTIMATES OF THE REVENUE EFFECTS OF ITS ORDER.

It is evident that these checks and estimates could not have been of record, as the effect of the order could not have been known before the order itself was determined upon. The very *basis* of the checks and estimates, that is, the factor which is checked and the effect of which was estimated, was not itself in the record. The Commission was not merely basing its order upon data not submitted to the carriers for cross-examination, but was basing that data upon other facts (the increases and decreases actually ordered) which were, in turn, necessarily not known to the carriers or subject to their cross-examination.

The Commission's brief is in error in stating that "the checks and estimates referred to by the Commission were, of course, in respect of matter put into the record as to which appellants had had their opportunity of cross-examination and rebuttal" (Brief, pp. 79-80). The checks and estimates were of the revenue effects of *the order itself,* which could not have been determined—even approximately—prior to its rendition, particularly if—as we are told must have been the case—it was revised after the decision of the *Ann Arbor* case.

6. Appellees failed to meet the point that the Commission's decision was arbitrary in that it was based upon the realization that a failure of the present revision to afford adequate revenues would prompt further proceedings.

This point is not met in any of the briefs for the appellees. It also was not advanced frivolously or as a mere make-weight.

The very argument advanced by the appellees to support the action taken, places the Commission squarely on the horns of a dilemma. On the one hand, the Commission is defended for making its determination "in the realization that a failure of the present revision to afford adequate revenues will prompt further proceedings," on the ground that it was impossible for it accurately to forecast what would result, and that, therefore, situations requiring further consideration might be brought to its attention (Commission's Brief, p. 78). On the other hand, the offers of the carriers to bring to the Commis-

sion's attention the serious decrease in revenues, and to prove that increased revenues had not in fact been granted in certain other cases, were denied by the Commission out of hand; and the Commission's brief justifies the denial by the argument that the Commission necessarily projects into the future the results of a decision based on the conditions disclosed in the record (Commission's Brief, p. 82).

Where then are the railroads to seek relief? Where is the country to find its safeguard of an adequate system of transportation? When the carriers offer evidence that a proposed reduction in rates will threaten the maintenance of an adequate system of transportation, the Commission tells the carriers to give the reduction a trial and reassures them by a statement that it, itself, realizes that a failure of the revision to afford adequate revenues will prompt further proceedings by the carriers. When, for two full years after the close of the Record, the revenues fall off seriously notwithstanding that the new reduction has not yet gone into effect, the carriers, acting in conformity with the anticipation of the Commission, come to the Commission for relief instead of going to Court, and show to the Commission that (1) their revenues are declining in an alarming degree, (2) their traffic (other than the specific class of traffic herein involved) is also declining in an alarming degree, and (3) that the increased revenues which the Commission suggested might be realized from certain other cases (but in respect of which the Commission had not given the carriers a hearing) would not in fact be realized, what does the

Commission do? It denies the petition for rehearing in 13 days.

In this case, the carriers were literally *forced* to appeal to the Courts.

Respectfully submitted,

WALTER MCFARLAND,
ELMER A. SMITH,
P. F. GAULT,
DOUGLAS F. SMITH,
H. H. LARIMORE,
J. N. DAVIS,
A. B. MASON,
R. J. HAGMAN,
M. L. COUNTRYMAN, JR.,
R. S. OUTLAW,
LESLIE CRAVEN,
A. B. ENOCH,
D. P. CONNELL,
DICK DIXON,
FRANK A. LEFFINGWELL,
Attorneys for Appellants.

FREDERICK H. WOOD,
WILLIAM D. WHITNEY,
G. HOWLAND CHASE,
Of Counsel.

December 2, 1931.

FILE COPY

FILED
NOV 25 19
CHARLES ELMORE

No. 287

In the Supreme Court of the United States

OCTOBER TERM, 1931

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

NOVEMBER, 1931.

SUBJECT INDEX

	Page
OPINIONS	1
QUESTIONS	2
STATUTES	3
STATEMENT	3
1. Proceedings before the Commission	3
2. Proceedings in the District Court	19
SUMMARY OF ARGUMENT	19
ARGUMENT	23
I. THE COMMISSION DID NOT BASE ITS ORDERS UPON A MISCONCEPTION OF POWERS CONFERRED UPON IT BY THE HOCH-SMITH RESOLUTION SIMILAR TO THAT CONDEMNED IN ANN ARBOR R. R. v. UNITED STATES, 281 U. S. 658	23
A. The Commission's statement of the issues to be determined and the findings made upon those issues are responsive to applicable provisions of the Interstate Commerce Act and neither they nor any discussions in the report suggest that other than the usual standards of rate reasonableness and relations entered into the determination	35
B. The changes in rates and practices effected by the orders, instead of supporting appellants' position that the Commission proceeded under its former conception of the Hoch-Smith Resolution, afford positive showing that the determination was reached under the Interstate Commerce Act	47

ARGUMENT—Continued.

Page

(1) The general increases in coarse grain rates, the increases in some wheat rates, and the elimination of transit balances outbound from primary markets are not reconcilable with appellants' assumption that the purpose was to treat agricultural products as a favored class rather than to establish reasonable and properly related rates..... 47

(2) The fact that the general adjustment of rates on grain and its products made in this case throughout western territory effects changes in rates recently prescribed as reasonable in other cases, lends no support to appellants' contention that the Commission did not (as stated by it) base its action on the provisions of the Interstate Commerce Act..... 56

C. Appellants' statement that the Commission did give consideration to Section 15a is correct; their statement that the Commission's duties under Section 15a are to be performed in the carrying out of its power to prescribe just and reasonable rates, is also correct; but their position, in substance, that the Commission reached its determination under a supposed duty to favor agricultural products instead of in the exercise of its power to fix just and reasonable rates is (as under all chapters of their brief) incorrect..... 63

(1) The order effected great economies under the line haul rates, and the general increases in rates on coarse grains went mostly to carriers in special need thereof..... 74

II. There were no irregularities in the Commission proceedings..... 79

III. There was no abuse of discretion by the Commission in denying the several motions for rehearing and reconsideration..... 80

CONCLUSION..... 83

Page

APPENDIX (The Statutes involved)..... 84

Interstate Commerce Act (U. S. Code, Tit. 49, Ch. 1)..... 84

Section 1 (5)..... 84
Section 3 (1)..... 84
Section 15 (1)..... 84
Section 15a (2) and (3)..... 86

Hoch-Smith Resolution (Joint Resolution of January 30, 1925, U. S. Code, Tit. 49, Sec. 55)..... 87

TABLE OF CASES

Alleged Unlawful Practice Transportation Grain, 7 I. C. C. 240.. 11
American Express Co. v. *Caldwell*, 244 U. S. 617..... 14
Ann Arbor R. R. v. *United States*, 281 U. S. 658..... 3, 20, 26, 31
A., T. & S. F. Ry. v. *U. S.*, 279 U. S. 768..... 8, 10, 13
Beaumont, Sour Lake & W. Ry. v. *U. S.*, 282 U. S. 74..... 45
Blodgett Mill Co. v. *C., M. & St. P. Ry.*, 23 I. C. C. 448..... 11
Central R. R. Co. v. *United States*, 257 U. S. 247..... 11
Central Yellow Pine Assn. v. *V. S. & P. Ry.*, 10 I. C. C. 193... 12
Cowan v. *Bond*, 39 Fed. 55, 2 I. C. C. 542..... 12
Deciduous Fruit Case, 281 U. S. 658..... 26, 31, 36
Douglas & Co. v. *C. R. I. & P. Ry.*, 16 I. C. C. 232..... 12
Fifteen Per Cent Case, 178 I. C. C. 539..... 81
Import Rate Case, 162 U. S. 197..... 11
Increased Rates, 1920, 58 I. C. C. 220..... 67, 72
Indianapolis Freight Bureau v. *C. C. C. & St. L.*, 15 I. C. C. 730.. 12
Interstate Com. Comm. v. *L. & N. Ry.*, 227 U. S. 88..... 79
Interstate Com. Comm. v. *Union Pacific R. R.*, 222 U. S. 541... 25
Lathrop-Marshall Co. v. *C. & N. W. Ry.*, 144 I. C. C. 227..... 11
Louisiana & Pine Bluffs Ry. v. *U. S.*, 257 U. S. 114..... 26
Manufacturers Railway Co., v. *U. S.*, 246 U. S. 457..... 45
Mississippi R. R. Com. v. *A. & V. Ry.*, 93 I. C. C. 435..... 12
Mississippi R. R. Comm. v. *A. & V. Ry.*, 89 I. C. C. 47..... 11
Montgomery Cotton Exchange v. *L. & N. R. R.*, 112 I. C. C. 325. 12
Muller Case, 151 I. C. C. 787..... 31
New England Divisions Case, 261 U. S. 184..... 73, 78
North Packing Co. v. *Dir. Genl.*, 104 I. C. C. 607..... 12
Ogden Grain Cases, 126 I. C. C. 255..... 31
Ogden Grain Exchange v. *Abilene etc. Ry. Co.*, 122 I. C. C. 691. 31
Ogden Grain Exchange v. *Ariz. Eastern R. R. Co.*, 126 I. C. C. 255. 31, 57
Oklahoma Com. v. *Abilene & S. Ry.*, 148 I. C. C. 316..... 11, 57
Oklahoma Corp. Com. v. *A. & S. Ry. Co.*, 101 I. C. C 116..... 60
Oklahoma Millers League v. *A. & M. R. R.*, 128 I. C. C. 523.. 14, 42, 60
Oregon R. R. Com. v. *Oregon Short Line*, 23 I. C. C. 151..... 11
R. R. Com. of Wis. v. *C. B. & Q.*, 257 U. S. 563..... 44, 45, 78
Rates on Grain, etc., 64 I. C. C. 85..... 67

	Page
Rate Structure Investigation, Part VII, Grain Products within Western District, etc., 164 I. C. C. 619; 173 I. C. C. 511	1, 5
South Carolina Assn. v. Aberdeen R. R., 152 I. C. C. 5	31
Spiller v. A., T. & S. F. Ry., 253 U. S. 117	26
Substitution Tonnage, 18 I. C. C. 280	11
Transit Case, 24 I. C. C. 340	8, 11
United States v. Abilene & Southern Ry., 265 U. S. 274	79
United States v. L. & N. R. R., 235 U. S. 314	11
United States v. Tennessee, 262 U. S. 318	26
Wichita Board of Trade Case, 29 I. C. C. 376	11
Wisconsin Passenger Fares Case, 59 I. C. C. 391	44
Wisconsin Railroad Com. v. C., B. & Q. R. R., 257 U. S. 563	44
Wool Rates, 91 I. C. C. 235	12

STATUTES CITED

Interstate Commerce Act (U. S. Code, Tit. 49, ch. 1)	
Section 1 (5)	84
Section 3 (1)	84
Section 15 (1)	84
Section 15a (a) and (3)	86
Hoch-Smith Resolution (43 Stat. 801)	87
Public Res. No. 46, 43 Stat. 801	

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 287

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al., appellants

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION et al., appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the specially constituted District Court denying the application for a preliminary injunction (R. 698) is reported in 51 F. (2d) 510.

The reports of the Commission appear as Docket No. 17000, *Rate Structure Investigation, Part VII, Grain and Grain Products within the West-*

ern District and for Export (R. 69, 275), and are reported in 164 I. C. C. 619 and 173 I. C. C. 511.

QUESTIONS

In a proceeding before the Interstate Commerce Commission involving rates on grain and grain products within the Western District and for export, which was part of a general investigation into the rate structure of carriers subject to the interstate commerce act undertaken pursuant to direction of Congress contained in the Hoch-Smith Resolution,[1] the Commission, upon findings that the then rates on grain and its products, and practices thereunder, were unreasonable and unduly preferential and prejudicial, entered orders requiring the establishment of reasonable and justly related rates, abolishing certain practices and imposing limitations or restrictions upon others. Following the hearing in the suit brought by the carriers and others, whereat applications both for a restraining order and a preliminary injunction were submitted (R. 658), the lower court, on May 7, 1931, issued a restraining order staying the Commission's orders 60 days to enable it to determine the legal questions presented. On July 7, 1931, said court entered its order (R. 708) denying the application for preliminary injunction; and from that order the carriers have taken this appeal.

[1] Public Resolution No. 46, 68th Congress, 43 Stat. 801, set forth in full in Appendix to this brief.

In its report the Commission had expressly referred to this Court's holding in *Ann Arbor R. R.* v. *United States,* 281 U. S. 658, that the Hoch-Smith Resolution sets up no standard of rate lawfulness other than as provided by existing law, and stated that "The findings herein are under the provisions of the interstate commerce act."[2] Appellant carriers have not challenged the validity of the orders on the ground of lack of supporting evidence (R. 696) and the record made before the Commission has not been introduced in the suit. The questions presented are;

1. Whether the Commission misconstrued the Hoch-Smith Resolution to set up a standard of rate reasonableness and relation different than as provided in the Interstate Commerce Act.

2. Whether the Commission misconstrued the provisions of Section 15a of the Interstate Commerce Act.

---

[2] That *Ann Arbor R. R.* v. *United States,* 281 U. S. 658, did not affect the direction given to the Commission by the second paragraph of the Hoch-Smith Resolution to undertake thorough investigation of the rate structure of the country is shown by the decision in that case, wherein it was said, at page 667:

"The second paragraph is devoted chiefly to requiring the Commission to proceed along stated lines for the purpose of securing prompt observance of existing laws, such as sections 1 (5) and 3 (1) of the Interstate Commerce Act, requiring that all rates be just and reasonable and prohibiting all undue preferences and unjust discriminations, whether relating to shippers, commodities, classes of traffic or localities. * * *"

3. Whether the Commission's action, in denying petitions for rehearing and reconsideration, was an arbitrary abuse of its discretion.

4. Whether there were irregularities in the Commission proceedings.

STATUTES

The pertinent provisions of the Interstate Commerce Act and the provisions of the Hoch-Smith Resolution are set forth in the Appendix to this brief.

STATEMENT

1. PROCEEDINGS BEFORE THE COMMISSION

In response to direction contained in the joint resolution of Congress known as the Hoch-Smith Resolution (43 Stat. 801) the Interstate Commerce Commission on March 12, 1925, instituted an investigation of the rate structure of common carriers subject to the Interstate Commerce Act (R. 45) and, thereafter, divided the investigation into separate proceedings, each to cover rates on particular kinds of traffic. The proceeding, in which the orders here involved were entered, related to "rates and practices affecting the transportation of grain and grain products throughout the Western District (on and west of the Mississippi River, including east bank crossings) and in Illinois; from lower lake ports to Atlantic ports on ex-lake grain (grain transported across the Great Lakes to lower lake ports); and from all points in the Western District

to all ports of export." *Rate Structure Investigation, Part VII, Grain and Grain Products within Western District and for Export*, 164 I. C. C. 619, 625. (R. 69, 75.)

The grains involved were wheat and coarse grains, also flaxseed. The coarse grains were mainly corn, oats, rye, and barley; the grain products were chiefly flour and mill feeds. (R. 75.)

Disposed of with the main proceeding, as shown by Appendix A of the report, there were 38 formal complaint and suspension proceedings, also subnumbers thereof (R. 69, 197), which, considered together, brought in issue all phases of the grain rate structure involved in the Commission's general investigation. Many state commissions, chambers of commerce, boards of trade, traffic associations, and individual shippers and producers intervened and participated in the proceeding.

Hearings were held in many cities and extended over a period of more than a year. Oral argument before the Commission lasted 20 days. During the year which elapsed between the submission of the case, July 1, 1929, and issuance of the first report, July 1, 1930, "thorough examination" was "made not only of the immediate transcript of some 53,000 pages, but also of the 2,100 exhibits and approximately 20,000 pages of briefs, exceptions, oral argument, and final memorandums." (R. 147.) Further painstaking examination of that record was made during the period elapsing between the

issuance of said first report and the issuance of the supplemental report, April 10, 1931. (R. 275.)

Specifying the main issues the Commission said:

> The question here presented is whether, under present conditions, the rates on grain and grain products throughout the western district are reasonable and just and are properly related to each other and to the rates on other traffic. The answer must take into account not only comparisons of distance, transportation conditions, and ton-mile and car-mile earnings on grain and other commodities, but also whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by law, including section 15a of the interstate commerce act, which we construe to permit, but not to guarantee, the carriers to earn 5.75 per cent on the fair value of the property devoted to the transportation service. (R. 71.)

Inextricably involved in the determination of those main issues, and brought into sharp relief by the record, there were the further issues as to whether certain regulations of the carriers in connection with the "transit privilege" (presently to be described) were reasonable and nondiscriminatory. Thereunder it was the common practice, except in the northwest, to accord successive free stops[3] in transit of grain or its products and, often

[3] Where no extra charge is exacted from the persons receiving the terminal services incidental to stops in transit. (R. 103, 159, 193.) Carriers in the Northwest made extra charge on parts of their lines (R. 104).

coupled therewith, to perform extensive back-haul and out-of-line service[4] without extra charge exacted from those desiring and receiving the service (R. 103, 194, 158, 159, 193); thereunder there had grown up the dual system of proportional rates[5] and much lower "transit balances"[6] from primary

[4] By back-haul is meant a diversion from the direct route of shipment to a transit point and back to the point of diversion for continuation over the direct route; by out-of-line haul a diversion from the direct route to a transit point and back to the direct route at a point other than the point of diversion. (R. 103.)

[5] As used in the report "A proportional rate is a local or joint rate dependent for application upon (1) a previous transportation to the point from which the proportional rate applies; (2) a subsequent transportation from the point to which the proportional rate applies; (3) or both. It is supposed to be a part of a through rate and is usually lower than the flat rate between the same points. When dependent upon previous inbound transportation it is applicable only upon surrender of the inbound paid freight bill showing the transportation of the shipment inbound. The freight bill need cover only an equivalent inbound tonnage, as preservation of identity grain is not required. (R. 83.)

[6] A transit balance is the remainder of a one-factor (single line or joint) through rate from origin to destination after deducting the rate paid at completion of the inbound movement to the transit point. (R. 83.) Proportional rates (except varying proportionals to be discussed later) are constant in amount to any particular destination, whereas transit balances vary in amounts dependent upon origin of the inbound shipments. "If the inbound freight bill covers a shipment from an origin point from which there is no overhead rate, with transit to final destination, the outbound shipment is at the proportional rate." (R. 84.)

markets' (R. 86 to 89, 193), causing discrimination and having substantial effect on carrier revenues; and, commonly used, there was the "unit rule" (R. 106), under which the rate on mixed feed from milling points could be the balance of the through rate on any of its ingredients, however small the quantity of the ingredient and whatever the level of its rate, upon surrender of inbound expense bills covering an aggregate tonnage of that commodity equal to the weight of the outbound shipment of mixed feed. This rule was shown to be applied even where the transit balance was nothing, due to the identity of rate from origin to transit point with rate from that origin to reshipping destination. (R. 193.)

Broadly speaking, the transit privilege is that grain may be stopped at primary or other markets or interior milling of storage points for storing, conditioning, milling, and other purposes, and that it or its products may be reshipped at "transit balance" or "proportional rate," both hereinabove defined. The practice of according such privilege antedates the enactment of the Interstate Commerce Act (*A. T. & S. F. Ry.* v. *U. S.*, 279 U. S. 768, 778; *Transit Case*, 24 I. C. C. 340, 348) and, in its

---

1 "Primary markets," as herein used, refers to markets such as Duluth, Minneapolis, Sioux City, Omaha, St. Louis, Chicago, and Kansas City at which grain is stored in large quantities and from which proportional rates apply. Some of these markets (R. 82) are price-registering markets, that is, they have their individual prices for grain instead of merely reflecting the prices of other markets.

reasonable application, it is a natural development to fit the needs of the grain producing and marketing industries.

The average wheat crop of the United States is approximately 800,000,000 bushels, of which about 600,000,000 bushels are consumed in the domestic trade and about 200,000,000 bushels are exported. This tremendous tonnage begins to move from the winter wheat territories of the Southwest late in May, and the movement continues progressively with the season from States in the spring wheat areas farther north until late in the summer. Of the new crop much is taken by our millers, and much also is exported through the Gulf, Atlantic, and Pacific ports, including large quantities that seek outlets over the Great Lakes from Lake Michigan and Lake Superior ports to ports of export in the United States and Canada. (R. 81, 82.) Grain can not ordinarily be taken directly from the field to the consumer, but must be stored and sold at some concentrating point. Particularly, after the first purchases from a new crop are made from domestic milling or export, there is a large surplus, which can not be at once thrown on the export trade or on the domestic consuming market and must, therefore, be temporarily stored or find an intermediate market. This grain moves into interior milling or storage points and, in large quantities, into the important grain markets such as Kansas City, St. Joseph, Omaha, Sioux City, St. Louis, Peoria, Chicago, Minneapolis, and Duluth. At these latter

markets it is not only stored, but is also cleaned, clipped and given other treatment not so readily afforded at the interior points, and much of it is milled. From these markets it and its products are sold according to the vagaries of domestic and export demand and supply.

Under these conditions of marketing the final destination of a shipment of grain can not ordinarily be known when it first moves into a market for storage, treatment, or milling. Therefore, the local rate applicable to that point is collected. But the reshipment to final destination of grain so transited is made upon a proportional rate, or transit balance of a one-factor through rate, instead of upon the local rate from the intermediate point to destination. And, since identity of grain can not ordinarily be preserved, the transit provisions in the tariffs make such proportional rates or transit balances applicable to the reshipment upon presentation of inbound freight bills for an equivalent tonnage of grain.

Numerous investigations by the Commission have demonstrated that the practice of according "transit" is not only not unreasonable but that in connection with the transportation of grain it is a necessity and that it does not result in discriminations that are undue[1]—at least not when shorn of

[1] The substance of "transit" (namely, as considered apart from incidental terminal service, back haul, and other extra service) is the through basis of rates lower than the locals (*A. T. & S. F. Ry.* v. *U. S.*, 279 U. S. 768, 779–780), and the question of unreasonableness, or undueness of discrimination

abuses that have attached themselves thereto. The privilege is open to all shippers of grain and all either avail themselves thereof at one time or another or receive benefit therefrom in one way or another. Its working is to diffuse small mills all over the country and it is an important factor in enabling the marketing of grain at a profit. The practice has become universal and it has proved beneficial to the producer, the railroads and the public.

---

is administrative (Sec. 15 (1), I. C. Act, as amended by Hepburn Act, 1906, to include word "practice"; *Oregon R. R. Comm.* v. *Oregon Short Line*, 23 I. C. C. 151, 173; *U. S.* v. *L. & N. R. R.*, 235 U. S. 314, 320; *Central R. R. Co.* v. *U. S.*, 257 U. S. 247, 257). Analogous thereto is the common practice of classifying import rates on a lower basis than domestic despite the fact that there is no such singleness of rail and ocean hauls as would make the unit per mile costs of the rail carriers progressively decrease with the distance for the whole movement. All elements that affect the welfare of the carriers and public must enter into an administrative determination as to the justness of that practice. (*Import Rate Case*, 162 U. S. 197, 219.) The similar practice in respect of transited grain finds even more justification because of the circumstances peculiar to its transportation and marketing and benefits to carriers and all concerned; always provided that it is reasonably restricted and properly policed.

Alleged unlawful practice Transportation Grain, 7 I. C. C. 240; *Substitution Tonnage*, 18 I. C. C. 280; *Blodgett Mill Co.* v. *C. M. & St. P. Ry.*, 23 I. C. C. 448; *Transit Case*, 24 I. C. C. 340; *Wichita Bd. of Trade Case*, 29 I. C. C. 376; *Mississippi R. R. Comm.* v. *A. & V. Ry.*, 93 I. C. C. 435, 439; *Lathrop-Marshall Co.* v. *C. & N. W. Ry.*, 144 I. C. C. 227; *Okla. Comm.* v. *Abilene & S. Ry.*, 148 I. C. C. 316, 321.

In addition to grain, a variety of other traffic is accorded the transit privilege:

But many incidental practices had grown up around the privilege of "transit," such as successive "free stops," "back-hauls," "out-of-line hauls" and the "unit rule," all above described. And, too, the dual system of charging both proportional rates and transit balances from primary markets had grafted itself on to the grain rate structure.

The important grain markets are such by reason of basic natural and economic forces (R. 152), including their locations with relation to the grain fields, to the large consuming centers and particularly inbound and outbound channels of transportation. The transportation history of these markets has been one of intensive carrier competition for the outbound movements of the grain and its products after "transit," and the proportional rates from these markets are mainly the result of this competition.

Some carriers operated from the markets, whose lines did not reach through to the grain origins.

Wool Rates, 91 I. C. C. 235, 284; *Cowan* v. *Bond* (Cotton), 39 Fed. 55, 2 I. C. C. 542; *Montgomery Cotton Exch.* v. *L. & N. R. R.*, 112 I. C. C. 325, 333; *Miss. R. R. Comm.* v. *A. & V. Ry.*, 89 I. C. C. 47, 53; *Central Yellow Pine Assn.* v. *V. S. & P. Ry.* (logs), 10 I. C. C. 193, 214; *North Packing Co.* v. *Dir. Genl.* (live stock), 104 I. C. C. 607; *Indianapolis Freight Bureau* v. *C. C. C. & St. L. Ry.* (Steel Fabrication), 15 I. C. C. 370.

But transit is allowed only where the necessities of the particular commodity justifies it. There is a limit to the commodities that can be reasonably granted the privilege. *Douglas & Co.* v. *C. R. I. & Pac. Ry.*, 16 I. C. C. 232, 244.

To secure a share of the outbound business they published proportional rates equal to the rates or transit balances of carriers whose lines extended from the grain origins to the primary markets and beyond. (R. 85.) These latter carriers made applicable through the markets from many origins lower through rates with lower transit balances, varying with origins. (R. 86 to 89.)[10] So that at the time of the hearing all carriers serving the primary market had on file proportional rates (R. 85), but these had "come largely into a state of disuse" (R. 89) because of the lower transit balances applicable from most origins (R. 86–89).

As to the level of the rates, their relation to each other and to other "descriptions of traffic," the Commission stated that the relation of rates, as well as the general level was within the scope of the investigation; that the record required a general survey of the rates on grain and grain products throughout the western district from the standpoint not only of cost, but of general transportation conditions as well (R. 81); that the average "present rates" on grain and grain products differ "not only in general territories but in different localities in the same general territory" (107); that such particular rates vary between a range of 57

[10] The graphic example portrayed in *A., T. & S. F. Ry. Co. v. U. S.*, 279 U. S. 768, 772, is illustrative of the manner in which a rate over a direct route is made applicable over an indirect route through a primary market, leaving a transit balance lower than the proportional rate.

to 149 per cent of the scale prescribed in *Oklahoma Millers League* v. *A. & M. R. R.*, 128 I. C. C. 523, "using that as a convenient yardstick" (R. 107 to 109); that many rates are too low, others too high, and relative rates not in entire accord with transportation conditions; "that contributing to these variations are Canadian competition, State regulation and our own revisions [11] in certain territories"; that horizontal treatment of existing rates would perpetuate these inconsistencies and that some rates should, therefore, be reduced, some increased, and some left unchanged (R. 109).

The Commission's order of July 1, 1930 (R. 273) prescribed as maxima certain rates set forth in Appendix D (R. 244) of its report and required the carriers to desist from, and to observe, practices as provided in findings contained in the report.[12]

Appendix D specified the levels of several thousand rates between so-called key points and the carriers were directed to observe them as maxima in reconstructing their tariffs and to establish rates between other points in reasonable relation to the key-point rates. (R. 111.) The appendix also set

[11] On such widely produced commodities as grain experience has proved that adjustments should be territorial because lesser adjustments can not comprehend all rate relationships involved and merely serve to disturb, without correcting, the situation as a whole.

[12] Following the usual custom, the Commission's order referred to and made the report a part thereof. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 626.

forth so-called interior scales for application as maxima where no other rates were prescribed either specifically or by reasonable relation. (R. 111.) In connection with the rates so prescribed the Commission required that rates on coarse grains, which theretofore had been 90 per cent of the rates on wheat except in territory west of the Rocky Mountains and in Illinois, should take the same rates as wheat throughout the territory involved. (R. 101, 102.) It also required that free stops in transit should be limited to a maximum of two (plus one inspection), other stops to be paid for at the rate of 2 cents per 100 pounds [13]; and that there should be uniformity in this, including the Northwest; that there should be reasonable limitations of out-of-line hauls and back-hauls; that the unit rule and other transit provisions which served as a basis for unreasonable requests for transit should be eliminated. (R. 104, 107); that the carriers desist from the practice of contemporaneously charging both proportional rates and transit balances from the primary markets and the one method only of constructing rates on said markets be continued, namely, the separate inbound rate [14] and the proportional rate beyond. (R. 95.) This latter was done, not only to remove discriminations caused

[13] The service involved in transit stops is described in concurring opinions and each stop estimated to cost $20. (R. 149, 193, 184.)

[14] The inbound rate might be a proportional in the case of a shipment which, after transit at one primary market, moved on for transit at another primary market.

by the dual system of proportional rates and lower transit balances (R. 91, 95) and to prevent abuses in tariff practices (R. 94), but also to preserve the carriers' revenues (R. 93, 193).

For the bulk of the traffic outbound from the primary markets moved on transit balances much lower than the proportional rates, and it was the Commission's belief that the discontinuance of transit balances, much lower than the proportionals, would not only preserve "but would substantially increase carriers' revenues, even with substantial reductions" in the combination rates on the primary markets. (R. 93). In this connection it should also be mentioned that the Commission prohibited application of the prescribed combination on one primary market through another primary market, whose combination was higher, except in respect of direct shipments without "transit." (R. 95.) This permitted carriers over indirect routes to meet the competition of direct routes, while preventing the prescribed proportionals from being displaced by what would be altogether unreasonably low transit balances.[15]

While the rate changes required by the order were for the most part reductions, many increases

[15] The example cited in concurring opinion of Commissioner Porter of a direct rate on molasses to Chicago which, as applied over an indirect route with transit at Kansas City and in connection with the "unit rule," resulted in a transit balance of nothing on a shipment of mixed feed from Kansas City to Chicago (R. 193) instances the extremes of carrier competition for business.

were also effected, some on wheat but particularly in the rates on coarse grains (R. 191); transit balances from the important markets were supplanted entirely by the higher proportional rates, which had theretofore been largely subordinated to the transit balances; and great economies in transportation under the prescribed rates may reasonably be expected to follow from the restrictions imposed upon the carriers' transit practices, i. e., limiting the number of transits without separate charge and the direction to the carriers to restrict out of line and back hauls (R. 149, 193).

The Commission's supplemental report and order, 173 I. C. C. 511, was entered April 10, 1931. Thereby certain "findings in the original report were clarified in some instances and corrected and modified in others." (R. 275.) Some modifications were made in rate levels theretofore prescribed to bring them into better relation with other rate levels, or to avoid violations of the 4th section of the Act. Notably, the proportional rate from Minneapolis to Chicago was increased from 11 to 12 cents per 100 pounds, and that from Minneapolis to Duluth from 4.5 to 5.5 cents (R. 292, 293); a regrouping was prescribed in rates from Montana points to Portland and Seattle, Minneapolis and Duluth, and to California points, which resulted in some increases and some reductions (R. 303, 304; and permission was given to establish a minimum rate of 10 cents into the primary markets both in connection with the interior scales and

the flat rates prescribed (R. 288, 289, 292). Under the interior scales the theretofore minimum had been 6 cents and the prescribed flat rates had, for some distances, been less than 10 cents.

As said by Commissioner Meyer, the Commissioner in immediate charge of the case:

> The record in this case for the first time presents a complete view of the existing grain rates in western territory and places before us facts upon which a revision may be attempted. * * *
>
> The report sets up a revised grain-rate structure which I believe experience will demonstrate to be an improvement over that which now exists. The new structure is not a glorified distance scale nor a symmetrical geometrical figure. It is a system of functionally related rates which fit the grain business as described in this record. (R. 150.)

The case was submitted July 1, 1929, and the first report and order were issued July 1, 1930. (R. 69.) The supplemental report and order were entered April 10, 1931. (R. 275.) The latter, in addition to making the changes heretofore mentioned, denied various petitions for rehearing, reargument, and reconsideration. (R. 280.) The original order was to have become effective October 1, 1930. "Because of the mechanical difficulties involved in the preparation and printing of the numerous tariffs containing the hundreds of thousands of rates to be revised" (Appellant's Brief 123), the effec-

tive date was thereafter postponed from time to time; and the supplemental order fixed June 1, 1931, as the date upon which the order in the case, as thereby corrected and modified, should become effective (R. 325).

2. Proceedings in the District Court

April 29, 1931, appellant railroads filed their petition to enjoin the Commission's orders. (R. 4.) April 30, 1931, appellant, Terminal Grain Company et al., filed their petition for the same relief. (R. 611.) May 7, 1931, the lower court ordered that the two cases so instituted be consolidated. (R. 628.) The petitions did not challenge the validity of the Commission' orders on the ground of lack of supporting evidence (R. 696) and the record made before the Commission was not introduced in the suit. May 6 and 7, 1931, the consolidated cases were argued and submitted on applications for restraining order and preliminary injunction. May 7, 1931, the lower court issued a restraining order staying the Commission's orders 60 days to enable it to determine the legal questions presented. (R. 658.) July 7, 1931, said court entered its order vacating said restraining order and denying the application for preliminary injunction (R. 708), and from said order appellants have taken this appeal (R. 709).

SUMMARY OF ARGUMENT

1. The Commission's orders were not based upon a misconception of powers under the Hoch-Smith

Resolution similar to that contained in *Ann Arbor R. R.* v. *United States*, 281 U. S. 658. Its report in this case after making express mention of that decision declares that "the findings herein are under the provisions of the Interstate Commerce Act." Appellants attribute to certain language of concurring commissioners in separate opinions the same misconception of power as prior to this court's said decision and then in turn attribute to the Commission's report what they read into the language of said separate expressions. But the possibility of such strained implication is refuted by the Commission's statement, in substance, that it had in contemplation this court's decision and was following its teachings.

The Commission's statement of the issues to be determined and the findings made upon those issues do not support appellants' contention that the Commission proceeded under its former conception of the Hoch-Smith Resolution, but instead constitute positive substantiation of its statement that its determination was reached under provisions of the Interstate Commerce Act.

The general increases in coarse grain rates over wide area, and the increases in some wheat rates are not reconcilable with appellants' assumption that the purpose was to treat agricultural products as a favored class pursuant to its former conception of the Hoch-Smith Resolution.

The fact that the general adjustment of rates on grain and its products, made in this case throughout western territory, effects changes in rates recently prescribed as reasonable in other cases lends no support to appellants' contention that the Commission did not base its action on provisions of the Interstate Commerce Act. The task of the Commission was a reconstruction of rates throughout the territory west of the Mississippi and Illinois, involving not only the level but the relating of the thousands of rates to each other. Moreover, the former line-haul rates covered far more service in that under the prescribed rates the Commission has put a stop to wasteful practices by limiting free stops to two, all others to be charged for; in that it has abolished the wasteful and unreasonable "unit rule"; in that it has generally condemned unreasonable "back-hauls," "out-of-line-hauls," and unreasonable use of circuitous routes; and in that it has required construction of rates on primary markets by flat inbound rates and proportional outbound rates exclusively, thereby eliminating the wasteful and discriminatory dual system of proportional rates and much lower transit balances.

2. Appellants' position that the Commission did give consideration to section 15a is correct; their statement that the Commission's duties under section 15a are to be performed in the carrying out of

its power to prescribe just and reasonable rates is a correct statement of the law. The Commission so interpreted section 15a and its findings and order were made pursuant thereto.

That the Commission gave careful consideration to the maintenance of an adequate transportation system is evidenced not only by its many requirements looking to economical management, that is, to the elimination of waste under the line-haul rates, but also by the fact that the increases in coarse grains over wide areas went to carriers shown to be in special need thereof, and that the so-called wheat carriers were in far better financial condition.

Appellants' contention that the Commission reached its determination under a supposed duty to favor agricultural products instead of in the exercise of its power to fix just and reasonable rates is (as under all chapters of their brief) incorrect.

The Hoch-Smith Resolution, paragraph 2, makes it the duty of the Commission to reconstruct the country's rate structure, and although final valuations are not available as yet, the Commission is to the best of its administrative ability accomplishing its task, giving full force to the purpose of the Transportation Act to maintain and promote an adequate transportation service.

8. There were absolutely no irregularities in the Commission proceedings.

4. There was no abuse of discretion by the Commission in declining the several motions for rehearing and reconsideration. Sound reasons must appear for rehearing of a proceeding of this kind, because reopening may mean further long drawn-out proceedings with the possibility that when the Commission again reaches a determination it will be again petitioned for rehearing on the same ground of alleged changed conditions. The needs of the carriers for general emergency relief was not special reason for reopening a particular docket submitted after long drawn-out proceedings, for purpose of giving effect to temporary conditions.

5. No issue is raised that the orders are unsupported by evidence.

ARGUMENT

I. THE COMMISSION DID NOT BASE ITS ORDERS UPON A MISCONCEPTION OF POWERS CONFERRED UPON IT BY THE HOCH-SMITH RESOLUTION SIMILAR TO THAT CONDEMNED IN ANN ARBOR R. R. v. UNITED STATES, 281 U. S. 658

As has been shown in the preliminary statement, the issues involved in the Commission proceeding were whether the rates involved were unreasonable, whether they were unduly preferential and prejudicial in their relation to each other or to the rates on other classes of traffic and whether certain practices under the rates were unreasonable or unduly preferential and prejudicial. In

the action taken upon those issues, the following provisions of the Interstate Commerce Act were immediately involved:

> SEC. 1 (5).—All charges * * * shall be just and reasonable and every unjust and unreasonable charge * * * is prohibited and declared to be unlawful.
>
> SEC. 3 (1).—That it shall be unlawful for any common carrier * * * to make or give any undue or unreasonable preference or advantage to any particular person * * * or locality, or any particular description of traffic * * * or to subject any particular person * * * or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage.
>
> SEC. 15 (1).—That whenever, after full hearing * * * the Commission shall be of opinion that any individual or joint rate, fare, or charge * * * or that any * * * regulation or practice * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable * * * rate, fare, or charge * * * to be thereafter observed in such case * * * and what * * *

> regulation or practice is or will be just, fair, and reasonable, to be thereafter followed * * *.

Consideration also had to be given to the provisions of section 15a, which will be set forth and discussed in a later chapter devoted to that section.

The Commission determined that the rates and practices were unreasonable and in some particulars unduly preferential and prejudicial, and determined and prescribed the just and reasonable rates and practices to be thereafter observed.[16] In *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 547; the court in announcing the familiar rule governing review of Commission orders, said:

> In determining these mixed questions of law and fact, the Court confines itself to the ultimate question as to whether the Commission acted within its power. * * * the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.

In the present case the petitions contained no allegation that the order was unsupported by substantial evidence (R. 696); "nor could a claim that the order was unsupported by evidence" have been insisted upon, since the evidence taken before the Commission was not introduced. *Louisiana &*

[16] To be more fully given in next chapter.

Pine Bluff Ry. v. *United States*, 267 U. S. 114, 116; *United States* v. *Tennessee*, 262 U. S. 318, 323, 324; *Spiller* v. *A. T. & S. F. Ry.*, 253 U. S. 117, 125. It follows that there was left for the lower court's "consideration only such legal questions as arise upon the face of the report, the order, and the pleadings." (R. 609.) It further follows that this appeal presents only the question as to whether the lower court was wrong in not holding that the Commission had exceeded its authority. Principally appellants rely upon the contention that the lower court erred in not reaching the conclusion that the Commission had based its order upon a misconception of its powers under the Hoch-Smith Resolution similar to that condemned by this court in *Ann Arbor R. R.* v. *United States*, 281 U. S. 658, hereinafter referred to as the *Deciduous Fruit Case*.

The Commission's order involved in that case was entered in a proceeding instituted by the California Growers and Shippers Protective League assailing rates on deciduous fruits from California to eastern destinations as unreasonable and unduly preferential under Sections 1 and 3 of the Interstate Commerce Act "and having an unjust and unreasonable basis and being too high within the meaning of the Hoch-Smith Resolution." In the suit brought by the carriers the validity of the order was challenged upon the ground, among others, that it was based upon a construction of said resolution which was inadmissible.

In upholding the carriers' contention this court pointed out, among other things, that the Commission report stated that the primary issue to be determined was whether the existing rates were in accord with the Resolution; that the Resolution effected a change in the basic law; that this change operated to eliminate a decision between the same parties wherein the Commission had found the same rates neither unreasonable nor unduly preferential; and that while it said the existing rates were unreasonable, the report as a whole shows this means they were deemed unreasonable under the joint resolution when construed as the Commission construed it, and not that they were deemed unreasonable or unduly prejudicial or preferential under Sections 1(5) or 3(1) of the Interstate Commerce Act.

Thereafter the court discussed the three paragraphs of the Hoch-Smith Resolution in their order:

The first paragraph declares it to be the true policy in rate making that the conditions prevailing at any time in the several industries shall be considered in so far as it is legally possible to do so, to the end that commodities may move freely. It was held that "this policy is not new."

The second paragraph directs the Commission to make a thorough investigation of the country's rate structure in order to determine whether existing rates are unreasonable, or unduly discriminatory as between various localities and parts of the country

and various classes of traffic, and to make in accordance with law such adjustments as may be found necessary to correct any defects found to exist. In making such adjustment the Commission is directed to give due regard, among other factors, to the general and comparative levels in market values of the various classes and kinds of commodities as indicated over a reasonable period of years, to a proper and natural development of the country as a whole, and to the maintenance of an adequate transportation system. The court's decision said that this paragraph "is devoted chiefly to requiring the Commission to proceed along stated lines for the purpose of securing prompt observance of existing laws such as Sections 1(5) and 3(1) of the Interstate Commerce Act * * *"; that those factors, particularly called to the Commission's attention, are matters that "have all been regarded as factors requiring consideration under existing laws. * * * And what is said about the maintenance of an adequate transportation system is but a reiteration of provisions embodied in existing laws."

The third paragraph, as immediately pertinent, reads:

> In view of the existing depression in agriculture, the commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the prod-

> ucts of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service; * * *.

The court pointed to this paragraph as the one which the Commission's report showed that it construed as making a change in the "basic law," as placing agricultural products in a most "favored class," as justifying a reduction in rates thereon, notwithstanding most of the carriers "have not as yet made the fair return" for which Section 15a. provides as a means of securing the maintenance of an adequate transportation system, and as requiring it to condemn the rates as unlawful although independently of the paragraph, they must have been upheld as lawful under the applicable sections, 1 (5) and 3 (1), of the existing law. The court held:

> We are of opinion that the Commission's construction can not be supported. The paragraph does not purport to make any change in the existing law, but on the contrary requires that that law be given effect. Nor does it purport to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law.

The above holding could not be more plainly stated. Furthermore, the court went on to point to the language principally responsible for the con-

struction given to the paragraph by the Commission; it said:

> The paragraph requires only that "lawful changes" in the rate structure be made; and we find in it no sanction for any other change * * *.
>
> The Commission stresses the concluding words in the same sentence with "lawful changes" and evidently regards them as qualifying the natural import of the latter and in effect specifying a new and reduced scale to be applied in rate making. * * *
> The words stressed are "at the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

The decision held that considering the connection in which these words are brought into the sentence they fall much short of supporting the Commission's construction; that while they should not lightly be disregarded, neither should they lightly be accepted as overturning unambiguous provisions of existing law that reflect a settled legislative policy; that

> If they mean no more than that the depressed condition of the industry is to be given such consideration as may be reasonable considering the nature and cost of the transportation service and the need for maintaining an adequate transportation system, they work no change in the existing law. But if they mean more and are intended to require that rates be reduced to some uncertain level below that standard,

> they give rise to a serious question respecting the constitutional validity of the paragraph of which they are a part. * * * By reason of their uncertain meaning * * * and of the constitutional question * * * we think they must be held to work no substantial change in the meaning or operation of Sections 1 (5), 3 (1), and 15, par. (1), of the existing law.

The Commission had the above plain statement of the law which it administered before it when it issued its orders, here under attack. In its report the Commission said:

> The Supreme Court of the United States recently interpreted the Hoch-Smith resolution as setting up no standard of reasonableness of rate level or relation other than that already provided by the interstate commerce act. *Ann Arbor Railroad Company* v. *United States*, — U. S. —, decided June 2, 1930. The findings herein are under the provisions of the interstate commerce act.

The lower court aptly characterized the above as a statement by the Commission that it had in contemplation the holding of this court in the *Deciduous Fruit Case* and that it was following the teaching thereof. (R. 705.) Appellants are here stressing numerous reports of the Commission rendered before the decision in the *Deciduous Fruit Case* was handed down (R. 45, 46; *Muller Case*, 151 I. C. C. 787; *Ogden Grain Cases*, 126 I. C. C. 255; *So. Carolina Asso.* v. *Aberdeen R. R.*, 152 I. C. C. 5), for

the purpose of showing that the Commission, in reaching its present determination, was still proceeding under its earlier construction of the resolution. For much the same purpose they are even referring to the Commission's decision in the *Deciduous Fruit Case,* reversed by this court. The need for the statement by the Commission that it was following the teaching of the court arose from the very fact that it had theretofore given to the resolution an interpretation different from that of the court.

Furthermore, appellants refer to language in concurring opinions of certain commissioners (Br. 70 to 73, 103, 104) as showing that they were still regarding agricultural products as favored commodities and fixing rates on the "lowest possible lawful" basis in the sense condemned by this court in the *Deciduous Fruit Case* (71) and, in effect, that such basis was adopted by the Commission as a whole since "there is nothing in the main report to the contrary" (Br. 104, 73). In answer to the same contention made below, the lower court said:

> But here we are met with the unconditional statement in the report that the Commission had in contemplation the holding of the Supreme Court in the *Ann Arbor Case* and that it was following the teaching thereof by making its findings under the law instead of under any alleged wrongful standard of the resolution. Furthermore, this statement, adopted by the complete Commission is effective refutation of plaintiff's contention that

certain individual members' statements, alleged to be indicative of a desire to adopt a standard other than the lawful one, went unchallenged." (R. 705.)

Moreover the lower court was unable to conclude that any words in said separate opinions had reference to other than lawful rates as defined in the *Deciduous Fruit Case*. In light of the fact that the decision in that case had, as shown above, particularly said that the words "lowest possible lawful rates" should be taken to mean no more than that the depressed condition of agriculture should be given such consideration as may be reasonable considering the nature and cost of the service and the need for maintaining an adequate transportation system, the argument of appellants that those words, or similar words, as appearing in the separate opinions referred to, were used in any other sense is unwarranted.[17]

The holding by this court in the *Deciduous Fruit Case* that the Hoch-Smith Resolution does not purport to make unlawful any rate, which under the existing law is a lawful rate, was plain. The Commission's statement of that holding and that it was making its determination under the Inter-

[17] A quotation from the separate opinion of Commissioner Meyer appears at the top of page 104 of Appellants' brief. To avoid possible misunderstanding the Court's attention is called to the fact that the rates referred to in the first two sentences of that quotation are export rates which the carriers some years ago voluntarily established in aid of a national program to reduce the surplus of wheat. This appears in the complete sentence from which the quotation is taken. (R. 153.)

state Commerce Act, was equally plain; and, as said by the lower court, it was unconditional. Even disregarding that express statement there is nothing in the report which suggests that any other standard had been followed. The then-existing rates and practices were found unreasonable and in some respects unduly preferential and prejudicial. The just and reasonable rates and practices were prescribed for the future.

Having attributed to said concurring commissioners the use of the "lowest possible lawful rate" basis in the sense condemned by this court, and then, having assumed that basis to have been adopted by the report despite its express disclaimer, page after page of appellants' brief, and its headnotes, thereafter refer to the rates as having been made on such basis. And thus, having thrust upon the Commission an already condemned standard of rate making, much of appellants' argument is that its use in connection with provisions of the Interstate Commerce Act is unlawful; that is, that the resolution made no change in the standards of fixing rates under the Interstate Commerce Act, whether for products of agriculture or other commodities, a matter already determined by this Court and the determination given express recognition in the Commission's report.[18]

[18] Appellants state that it is their understanding (R. 21) that Commission counsel took the position in the court below that under the Interstate Commerce Act and by direction of the Hoch-Smith Resolution the Commission was empowered to prescribe "the lowest possible lawful rates." The Commission's position below was the same as shown in it report and as taken here.

There are, it is true, two other contentions which are advanced to show that the Commission proceeded under its former conception of the Hoch-Smith Resolution rather than under the Interstate Commerce Act, namely, that its findings and the changes made in the rates are reconcilable only with the conclusion that it acted under powers conceived to flow from the resolution. But these are the very matters to which the Government and the Commission refer the Court in substantiation of the statement in the Commission's report that "The findings herein are under the Interstate Commerce Act."

A. The Commission's statement of the issues to be determined and the findings made upon those issues are responsive to applicable provisions of the Interstate Commerce Act and neither they nor any discussions in the report suggest that other than the usual standards of rate reasonableness and relations entered into the determination

We do not understand that appellants allege the orders to be invalid for lack of precise findings (Br. 76) in respect of what they themselves refer to as the "hundreds of thousands of rates" (Br. 76) involved, but rather that they contend that there is an absence of findings usually made in a case under the Interstate Commerce Act and that that fact "coupled with the presence of certain other findings, are persuasive that the order was

made either in response to a duty supposed to have been created by the Hoch-Smith Resolution to establish the lowest possible lawful rates on agricultural products affected by depression or in deference to the wishes and hopes therein expressed." (Br. 44.)

The certain other findings referred to relate to the condition of agriculture. There is, as stated by appellants, a summary of the condition of agriculture attached as an appendix to the report. There appears to be no good reason why it should not have been, since the "conditions in a particular industry may and should be considered along with other factors in fixing rates for that industry." *Deciduous Fruit Case,* 281 U. S. 658, 666. The consideration given this factor in the report is a half page statement of what the summary in the appendix covers, concluding with the statement that "while conditions affecting the grain farmer had been improving within the few years immediately preceding the hearing herein there is still depression in the grain industry." (R. 76, 77.) And there is the further statement later on in the report that "The effect upon the producer of any change in rates is more or less speculative, but the record seems clearly to indicate that any substantial benefit to the producer would more likely come from a reduction in the inbound rate than from any other

revision." (R. 93.) These are the only findings as to agriculture in the report itself.

The Commission's report stated that the question presented was whether under present conditions the rates on grain and grain products throughout the Western District are reasonable and just and are properly related to each other and to the rates on other traffic (R. 77); that the record requires a general survey of the rates on grain and grain products throughout the Western District from the standpoint not only of cost but of general transportation conditions as well; that the relation of rates as well as the general level is within the scope of the investigation; that it will be necessary to discuss general marketing conditions in their relation to rates (81), to take into account not only comparisons of distance, transportation conditions, and ton-mile and car-mile earnings on grain and other commodities, but also whether the general level of rates on all traffic as a whole is sufficiently high to accord the carriers a rate of return contemplated by law, including section 15a of the Act (77).

The Commission discussed five separate cost studies and analyses, one of which was prepared by the Chief of the Commission's Bureau of Statistics, not as an official document but as an expression of individual view. This covered operations of all carriers in the Western District, and in Illinois, Wisconsin, and Minnesota. One of the remaining

four studies was prepared on behalf of Kansas farm organizations and the remaining three by State commissions.

As to four of these studies the Commission said the final showing was of a distance scale purporting to represent the lowest scale of rates that would be justified by consideration alone of cost of service plus a 6 per cent return on that part of the property assignable to the movement of wheat, and purporting to show also that rates could be materially reduced from a standpoint of cost of service; that the study of the Oregon Commission (confined primarily to intrastate shipments) purported to show that rates on wheat in Oregon might be substantially reduced; that the cost formulas themselves recognize that the cost of transporting grain other than wheat, as well as flour and other grain products, which load substantially lighter than wheat, is greater than the cost of transporting wheat; that it will be understood that under the theory of these analyses the showing as to any grain or grain product will be duplicated as to any other commodity of the same loading irrespective of relative values and densities of tonnage; that the distance scale makes no provision for competitive routes of varying mileage or for differences in character of country, density of traffic, or other incidents of transportation, and that in order to compensate for these contingencies the scale would have to be in-

creased; that the contention is not advanced in connection with any of these analyses that rates should be based solely on cost of service; that it was not denied by the proponents that other than costs should also be given consideration in connection with the determination of a reasonable basis of rates on wheat; and that the proposed distance scales merely represented, as already stated, levels of charge that would not be considered too low from the standpoint alone of cost of service plus a 6 per cent return on investment. (R. 79 to 81.)

The Commission's report sets forth a table showing separately for each of the years 1921 to 1928 the percentages of return on book investment for the carriers of the Western District. For 10 specified railroads having 75 per cent or more of their mileage in Western Trunk Line Territory the average rate of return on book value was 2.97 per cent in 1927. In that year the table shows that for all railroads in the Western District the percentage was 3.92. The report then discusses the percentages of return of certain named railroads for that year, and sets forth the amount by which said roads were short of making a 5.75 per cent return for the 7 years following Federal control, and separately for the year 1927. The report's showing in respect of return on investment will be more fully discussed in a later chapter. Thereafter the report sets forth tables showing grain

and grain products revenue percentage of total revenues in 1924, grain and grain products percentage of total tonnage for various years, and certain other tables. In the text of its report the Commission said "For the calendar year 1927 on Class I railways of the Western District grain and grain products constituted of the total traffic 11.60 per cent of tons originated and 10.12 per cent of tons carried, including tonnage from connections." (R. 77 to 79.)

Subsequently the report contains a discussion of the wheat crop of the country and trend of movement, methods of rate-making and the history thereof, and, of particular importance in connection with the Commission's determination in the case, discussion of abuses shown to have grown up in connection with transit. (R. 81 to 99.)

The Commission's investigation showed that many wasteful and discriminatory practices existed in connection with transit services.[10] It found that free stops in transit should be limited to a maximum of two (plus one inspection), other stops to be paid for at the rate of 2 cents per 100 pounds; that there should be reasonable limitations of out-of-line hauls and back hauls; that the unit rule and other transit provisions that served as a basis for unreasonable requests for transit should be eliminated; and that present practices were un-

[10] It is estimated in a concurring opinion that the cost to the railroads of this transit service is approximately $30,000,000 per annum. (R. 149.)

reasonable, unduly preferential and prejudicial to the extent that they do not conform to the foregoing. (R. 104–107.) As to the method of constructing rates, the Commission found that the carriers' practice of contemporaneously charging both proportional rates and transit balances from the primary markets was unreasonable and unduly preferential and prejudicial. (R. 95.) In this connection, too, it found that said dual system was open to question from the standpoint of orderly tariff procedure (94) and was wasteful of carrier revenue (93). The Commission found "that the through rates herein prescribed, on the basis of flat rates to the primary markets and proportional rates beyond, will be reasonable; and that overhead through rates less than those combinations should be cancelled." (R. 95.) In this connection the Commission stated that "It is believed that making rates through primary markets exclusively by combination of flat rates to and proportional rates from the markets, would not only preserve but would substantially increase carriers' revenues, even with substantial reductions in both the inbound flat rates and the outbound proportionals, because of the discontinuations of transit balances much lower than the proportionals * * *" (R. 93.)

As to the level of the rates, their relation to each other and to other descriptions of traffic, the Commission found the average present rates on grain

and grain products differ not only in general territories but in different localities in the same general territory (107); that such particular rates varied between a range of 57 to 149 per cent of the scale prescribed in *Oklahoma Millers League* v. *A. & M. R. R.*, 128 I. C. C. 523, using that as a convenient yardstick (R. 107 to 109); that many rates are too low, others too high, and relative rates not in entire accord with transportation conditions; that contributing to these variations are Canadian competition, state regulation and our own revisions in certain territory; that horizontal treatment of existing rates would perpetuate these inconsistencies and that some rates should, therefore, be reduced, some increased, and some left unchanged. (R. 109.)

The Commission found that rates on coarse grains in the plains states east of the Rocky Mountains, including the southwest, were 90 per cent of the wheat rates; that from a transportation standpoint there is no justification therefor; that coarse grains load lighter than wheat; that perhaps the main argument in favor of the differential is the somewhat lower value; that substantial justice can best be done to shippers of both by one rate [illegible] oth classes of traffic. (R. 102.) The Comm[illegible]n found that the rates on flour are the same as on wheat except between certain parts of the Mountain Pacific group, and from east of the Rocky Mountains to Pacific Coast territory the flour rates are 7

cents higher than on wheat; that the rates on direct products of coarse grains are usually the same as on the coarse grains from which the products are made. After discussion of the reasons advanced for and against a differential on grain products, the Commission found that rates on wheat and on coarse grains and their products are unreasonable to the extent they exceed the rates prescribed in Appendix D. (R. 102, 103.)

The Commission's ultimate finding was that the present rates on wheat and on coarse grains and their products are unreasonable and unduly preferential and prejudicial to the extent they exceed the rates prescribed in Appendix D, to be applied in accordance with previous discussion as to rate-break relationship of commodities, transit, etc., and subject to the later discussion herein of general issues or specific adjustments; that rates from other points to the same destinations are unreasonable to the extent they exceed rates made with reasonable relation to the rates from neighboring key points herein specifically prescribed; that rates between points between which rates have not been prescribed specifically, or by reasonable relation, are unreasonable to the extent they exceed rates made on the basis of the so-called interior scales shown in Appendix D. Reasonable groupings of origin and destination points will be permitted.

The report further contains many rate adjustments of specific situations not calling for detailed

comment in connection with the issues raised here. (R. 118 et seq.)

The supplemental report issued April 10, 1931, about 9 months after the first report, clarified certain findings and made certain corrections. It also modified certain findings resulting in the rate changes already mentioned in the preliminary statement.

Appellants state that while the Commission gave consideration to the cost studies, it made no finding and treated them as would any tribunal which did not feel that the subject was necessary to a decision. (Br. 43.) But why then did the Commission select these from the 2,100 exhibits for discussion in the limited space possible in a report? This manner of dealing with evidence is not uncommon in Commission reports. For example, in the *Wisconsin Passenger Fares Case,* 59 I. C. C. 391, the Commission said at page 393:

> * * * Evidence offered by the carriers indicates that if the present intrastate fares are continued for one year and if there is the same intrastate travel during that year as in the calendar year 1919, the direct loss to the carriers due to their failure to secure the 20 per cent increase in intrastate fares will approximate $2,400,000, and if the 2-cent intrastate fare should become effective the loss would be approximately $6,000,000.

This statement of what the evidence indicated entered importantly into the decision in *Wisconsin*

R. R. Comm. v. *C., B. & Q. R. R.*, 275 U. S. 563, 566. In the present case the Commission made no formal findings on costs, but there can be no doubt but that it weighed and balanced this evidence with other evidence as clearly indicated in the report. (R. 80, 81.)

The findings above set forth purport only to be a part of the whole, but they are enough to refute the contention that a case under the Interstate Commerce Act is not disclosed. If the appellant's allegation is that the findings on each of the underlying facts entering into the determination are not precisely set forth and for that reason the case must be presumed to have been determined upon the conception that favored treatment should be given agricultural products and not as one under the Interstate Commerce Act, they themselves show that no such presumption can be reasonably entertained.

Since, as conceded by them (Br. 50), the amendment of 1906 to section 14 (1) of the Act dispensed with "formal and precise findings" (*Mfrs. Ry. Co.* v. *U. S.*, 246 U. S. 457, 487), this report is not essentially different in the matter of findings than many other reports of the Commission. As appellants well know, it was issued prior to the Court's admonition in *Beaumont, Sour Lake & W. Ry.* v. *U. S.*, 282 U. S. 74, and, too, the reason for absence of detailed findings is explained by the report itself. Under the heading "General Comment," it is said:

> From what has preceded, it must be obvious that this is an unusual proceeding. It embraces threescore and more of major issues, affecting every part of a vast territorial domain, each of which would ordinarily present a case of more than average importance and be treated in a separate report in the customary way. Detailed individual treatment of separate issues in this proceeding would result in a report encyclopedic in size, far beyond the limits of practicability, and require many months of additional time. As a practical matter it has therefore been impossible to discuss all of the facts bearing upon each issue. However, huge as this record is, thorough examination has been made not only of the immediate transcript of some 53,000 pages, but also of the 2,100 exhibits and approximately 20,000 pages of briefs, exceptions, oral argument, and final memorandums. (R. 147.)

So that any lack of detailed findings are on the face of things accounted for by past custom and the size of the case and afford no warrant whatsoever for the contentions that the Commission reached its determination under the misconception that the Resolution required it to treat agricultural products as a favored class, and afford no excuse for the charge (Br. 44, 60) that it reached its determination out of deference to the wishes supposed to be expressed by Congress in the Resolution.

B. The changes in rates and practices effected by the orders, instead of supporting appellants' position that the Commission proceeded under its former conception of the Hoch-Smith Resolution, afford positive showing that the determination was reached under the Interstate Commerce Act

(1) The general increases in coarse grain rates, the increases in some wheat rates, and the elimination of transit balances outbound from primary markets are not reconcilable with appellants' assumption that the purpose was to treat agricultural products as a favored class rather than to establish reasonable and properly related rates

It will be remembered that the Commission's order required rates on corn, oats, and other coarse grain which theretofore had been 90 per cent of the rates on wheat, except in territory west of the Rocky Mountains and in Illinois, to be made the same as the rates prescribed on wheat. It is not unfair to say that thereby the rates on grain as a whole in the territory east of the Missouri river where coarse grain predominates were increased. Notably was this true of Iowa, Minnesota, Wisconsin, North Dakota, eastern South Dakota, and northern Missouri, where the production of coarse grain predominates. (R. 101, 207.)

This situation may be illustrated by referring to pages 43 and 44 of the supplemental report, which shows that practically every rate on coarse grain is increased from the State of Minnesota to the markets of Chicago, Minneapolis, and Duluth. (R. 317, 318.) When read together with the revised page of the original report, there referred to, many of these increases will be seen to be sub-

stantial. Much the same situation is shown on page 807 of the original report (R. 257) with respect to the rates from Missouri to Chicago, Kansas City, and St. Louis, and on pages 808 and 809 of the original report (R. 258, 259) with respect to the rates from southeastern Missouri to St. Louis and Memphis. On pages 802 and 803 of the report (R. 252, 253) the situation is illustrated as to Iowa, the nation's greatest coarse-grain state. The substantial increases there made in coarse-grain rates to the great grain markets of Chicago, Omaha, St. Louis, and Minneapolis should be particularly noted. On page 818 (R. 268) substantial increases will be found in coarse-grain rates between points in Texas, an important coarse-grain state. Page 812 (R. 262) shows increases in the North Dakota rates. Page 821 (R. 271) shows the increases from Wisconsin to Milwaukee and Chicago. Page 817 of the original report (R. 817) and page 47 of the supplemental report (R. 321) show increases from South Dakota to Chicago and Minneapolis. A small average increase was also made in coarse-grain rates from Kansas points to Kansas City. (R. 254, as corrected by supplemental report R. 313.) Coarse grain is 60 per cent of the total grain crop of Kansas, 55 per cent North Dakota, 86 per cent Nebraska, 90 per cent Minnesota and South Dakota. (R. 101.)

There were some important increases in wheat rates. For example, page 810 of the original report (R. 260) and page 46 of the supplemental report

(R. 320) show an increase to 37½ cents in the export wheat rate of 32 cents from Central Montana to Seattle and Portland. This is an important increase, as will readily be observed from the discussion on pages 692 to 694 of the Commission's original report. Other increases in wheat rates are from North Dakota to Minneapolis-Duluth and to Chicago. (R. 812, 320.) The wheat rates from Minnesota to Minneapolis and Duluth were also increased. (R. 256, 319.)

The increases provided in the Commission's report can not be accurately measured without also considering the limitation to two free stops in transit, the requirement that for each additional stop two cents per 100 pounds shall be charged, and that for all stops of manufactured commodities for storage, including the first two, a charge of 2 cents per hundred pounds for each stop will also be exacted. Coupled with this there are the restrictions in respect of out-of-line hauls, circuitous routes, and back hauls. As has been heretofore said, the terminal cost involved in transit stops is estimated by concurring commissioners at $20 for each stop, and the total annual cost by one commissioner as $30,000,000. A footnote, at page 654, of the original report (R. 104) reads:

> The record describes 30 cars of grain kept in transit in Texas for 100 days, transported 1,500 miles, and finally delivered at a point 300 miles from original shipping point, the peregrinations of these cars including a

virtual shuttle service between Dallas and Fort Worth, to try those markets.

Commenting upon the waste of transportation under existing rates, Commissioner Porter said:

> The most shocking picture of wanton wastefulness in transportation is represented on this record in connection with the so-called free transit. Back hauls of from 50 to 500 miles are common. Devious meanderings of several hundred per cent in circuity are frequent, during which two to a dozen transits are accorded and are accepted as a matter of course. The low proportional rates out of the primary markets are mere paper rates, for little if any grain moves under them. It moves on the balance of the through rate far below any such rates. By the use of the mixing and unit rules it frequently moves out of the large market hundreds of miles for nothing. (R. 193.)

Referring to the same subject, Commissioner Eastman said:

> It is also conceded of record that there have been extensive and extraordinary abuses in transit service, arising chiefly from the competition of carriers for traffic, particularly those with indirect routes. After leaving the farm, grain may be transited several times before it reaches the final destination in the form of some manufactured grain produce, which may even be a neatly packaged cereal breakfast food. And in the course of this oft-interrupted jour-

> ney, it may wander about the country in serpentine fashion. Illustrations are given in the majority report. There may be actual back hauls of many miles. All this is done for the same rate as would be charged if the grain were hauled by a direct route without stop from origin to destination. At times the carrier which hauls the traffic from the transit point, instead of receiving compensation, finds that it has to pay for the privilege. This abuse of transit is especially characteristic of the southwest, and is urged by the carriers of that region as a compelling reason why their grain rates should be relatively high. (R. 159.)

Appellants' statement that the prescribed proportional rates are substantially lower than the proportional rates published in their tariffs is true. But the impression left by their general discussion that the reductions made in proportional rates represent a commensurate reduction in carrier revenue is squarely refuted by the Commission's report, particularly that portion of the report contained under the caption "Wide Use of Transit Balances." (R. 86 to 89.) It is there shown that prior to the grain case the proportional rates from important markets were displaced by lower transit balances, or remainders, of overhead through rates published as a unit and less than the combinations of flat rates to the markets and proportional rates beyond. Typical instances [20] of the wide use of

[20] The Court is respectfully requested to give especial consideration to the eleven instances as set forth in the report.

these transit balances are given at pages 636 to 638 of the report. At page 638 the report states:

> * * * * a substantial, if not the greater, part of the outbound tonnage from the Missouri River to both Chicago and St. Louis pays transit balances less than the proportionals. The same situation largely obtains in respect of shipments outbound from Minneapolis that have been stopped at that market.
>
> To the Southwest transit balances also apply on a substantial percentage of the total traffic beyond Omaha, St. Louis, and Kansas City. *The proportionals from Kansas City to the Southwest appear in fact to be rarely used.* To this territory there is a similar use of the transit balance in lieu of the proportional rate from Cairo, Ill., and Memphis, Tenn.
>
> To the Mississippi Valley, including Memphis and New Orleans, the situation is largely the same. To New Orleans the rates are less than the combinations on Omaha or Kansas City from Nebraska and from parts of northern Kansas. To both Memphis and New Orleans the rates are lower than the combinations on Kansas City *from southern Kansas, and transit balances of these rates from Kansas City and St. Louis afford the only means of those markets reaching the Mississippi Valley with wheat and flour from west of the Missouri River.* The Mississippi Valley adjustment will be referred to in more detail later.

> It will be seen that, because of overhead through rates less than the rate-break combinations, the proportional rates from and between the primary markets have come largely into a state of disuse. * * *"
> (Italics ours.) (R. 88 to 89.)

As an example of the working of transit balances, the flat rate from Altus, Okla., to Kansas City, was 35.5 cents, and the proportional rate from Kansas City to Chicago was 17.5 cents (R. 263, 244) resulting in a combination through rate of 53 cents. The through one-factor rate from Altus to Chicago was 43 cents. (R. 263.) Upon surrender of a freight bill showing an inbound shipment from Altus the reshipment from Kansas City to Chicago could be made at the difference between the rates from Altus to Kansas City and from Altus to Chicago, that is, at the transit balance of 7.5 cents in lieu of the specifically published proportional rate of 17.5 cents.

Appellants' brief refers to a reduction from 28.5 cents to 19 cents in the proportional rate from St. Louis to New Orleans. But the transit balances of overhead through rates less than the St. Louis combination were much less than this proportional rate of 28.5 cents. For example, from Wichita the through rate to New Orleans was 50 cents and the transit balance from St. Louis to New Orleans, after deducting the inbound rate of 31.5 cents from Wichita to St. Louis (combination of 18 cents from Wichita to Kansas City (R. 254) and propor-

tional rate of 13.5 cents beyond (R. 244)), was 18.5 cents.

Appellants refer to a reduction in the proportional rate from St. Louis to Little Rock from 23.5 cents to 10 cents. But the transit balances of overhead through rates less than the St. Louis combination were much less than this proportional rate of 23.5 cents. For example, from Kansas City to Little Rock the through rate was 26.5 cents and the transit balance from St. Louis to Little Rock, after deducting the inbound rate of 13.5 cents from Kansas City to St. Louis, was 13 cents. (R. 244.)

The proportional rate of 17.5 cents from Omaha to Chicago applied with transit at Kansas City, and yielded a transit balance of 9.5 cents, after paying initially the proportional rate of 8 cents from Omaha to Kansas City. (R. 88.) The new adjustment prescribed will result in a rate of 21 cents for the same service; namely, the combination of the prescribed new proportionals of 6 cents from Omaha to Kansas City and 15 cents from Kansas City to Chicago. (R. 244.)

Referring to example 6, on page 637 of the report (R. 87) shipments from Omaha through Minneapolis to Chicago were charged, not the combination of proportional rates of 16.5 cents from Omaha to Minneapolis and 13 cents from Minneapolis to Chicago, but the proportional rate of 16.5 cents from Omaha to Minneapolis plus an arbitrary of 11 cents from Minneapolis to Chicago on shipments to Chi-

cago proper, and plus an arbitrary of 8 cents from Minneapolis to Chicago on shipments to Chicago destined to points east of the Indiana-Illinois State Line. The new adjustment requires that on shipments from Omaha to Chicago, reshipped from Minneapolis, the combination of proportional rates will apply in all instances, and the effect will be to give to the carriers 12 cents, the new proportional rate, on all shipments from Minneapolis to Chicago, whether to Chicago proper or to points east of the Indiana-Illinois State Line.

The point to be emphasized is that, under the prescribed adjustment the proportional rates, and not the previously existing lower transit balances, will apply on all reshipments from the markets.

Referring back to the general increases in rates on coarse grains over a large and predominantly coarse-grain territory, and to the above-mentioned increases in rates on wheat, it seems clear that this action is positive refutation of appellants' charge that the Commission's purpose was to treat agricultural products as a favored class rather than to fix reasonable and properly related rates under the Interstate Commerce Act. The elimination of transit balances lower than the proportional rates outbound from primary markets is persuasive to the same effect although from a somewhat different angle.

The Commission said that it believed the making of rates exclusively by combination of inbound

rates to and proportional rates from the market would not only preserve but would substantially increase carrier revenues even with substantial reductions in the present inbound rates and outbound proportionals because of the discontinuance of transit balances much lower than the proportionals. (R. 93.) Unquestionably the Commission's action in terminating the competitively wasteful and discriminatory dual system of proportional rates and much lower transit balances from the important markets and requiring the application in all instances of the proportional rates from those markets is one of the outstanding constructive accomplishments of its order; and that action was plainly for the purpose of protecting carrier revenues from wasteful competitive practices and stopping unjust discriminations resulting therefrom.

(2) The fact that the general adjustment of rates on grain and its products made in this case throughout western territory effects changes in rates recently prescribed as reasonable in other cases, lends no support to appellants' contention that the Commission did not (as stated by it) base its action on the provisions of the Interstate Commerce Act

As heretofore said, the Commission's report, after mention of the holding of the Supreme Court in the *Deciduous Fruit Case, supra,* that the Hoch-Smith Resolution set up no standard of rate reasonableness, or rate relationship, other than that already provided for by the Interstate Commerce Act, expressly states that: "The findings herein are under the provisions of the Interstate Commerce Act." In further dispute of this statement

by the Commission as to the basis of its action, appellants point to certain reports issued prior to this court's decision in the *Deciduous Fruit case, supra.*

Appellants state (Br. 63) that among the existing rates approved or prescribed during the pendency of this proceeding, are (1) the rates from southern Idaho to Pacific Coast ports and to points in California and Arizona, prescribed in *Ogden Grain Exchange* v. *Arizona Eastern R. R. Co.*, 126 I. C. C. 255, 128 I. C. C. 490, 132 I. C. C. 46, and (2) those from points in Utah, Idaho, Montana and Wyoming to points in Colorado, prescribed in *Ogden Grain Exchange* v. *Abilene & Southern Ry. Co.*, 122 I. C. C. 691. Appellants argue therefore that the reductions required in this case in the rates previously prescribed in those cases, were made in furtherance of a reserved jurisdiction to prescribe lower than reasonable rates pursuant to a supposed duty to favor the products of agriculture.

As to the first of these cases, 126 I. C. C. 255, appellants have correctly stated that the rates previously prescribed therein are reduced by the order in this case, but appellants erroneously measure the effect of the latter order solely by a comparison of rates without also comparing the services authorized in connection with the compared rates. The former order permitted an unlimited number of stops for

transit without additional charge, contained no prohibition against carriers retaining unduly circuitous routes, and did not restrict wasteful out-of-line and backhauling arrangements, whereas the order in this proceeding permits but two free transit stops without additional charge and prescribes a charge of 2 cents per 100 pounds for each transit in excess of two, and requires a separate charge for all stops of manufactured products for storage, in addition to requiring curtailment of wasteful and expensive routing and back-haul transit arrangements. And it has already been shown that this extra service without extra charge imposes a heavy burden on the line haul rates.

As to the second case (122 I. C. C. 691), appellants allege that the Commission prescribed reasonable maximum rates from points in Utah, Idaho, Montana, and Wyoming to Colorado, and that the rates so prescribed are reduced by the order in this case. This is not the fact. The order in this proceeding increases the rates from Oregon, Idaho, and Montana to Colorado, as will be demonstrated by applying the intermountain scale, page 822 of the present report (R. 272), to the distances shown at page 696 of the report in 122 I. C. C. 691. The other rates prescribed in 122 I. C. C. 691 (Docket No. 16112), never became effective because our further order therein of June 24, 1927, postponed the effective date of the reduced base rates

from Colorado common points, and consolidated the case with this proceeding for further consideration. (R. 197.) Accordingly, since the only rates affected by the order in this proceeding are increased, appellants' argument that the Commission was proceeding pursuant to a supposed duty to accord products of agriculture favored treatment, seems to find little support under the real facts of that case.

Equally inaccurate is appellants' discussion (Br. 64) of rates between southern Missouri, Arkansas, Oklahoma, Louisiana, and Texas. The impression is left that only one mileage scale is applicable in this territory, that said scale was prescribed during the pendency of this proceeding, that it is materially reduced by the order in this proceeding, and that the average reduction on wheat up to a distance of 750 miles (within which appellants assert that the principal movement occurs, but for which there is no support in the record), is approximately 15 per cent. In order that the Court may get the correct picture of the grain-rate adjustment in the Southwest, a background of the situation will be given.

Prior to our decision in this case there were two mileage scales of rates in effect on grain in the Southwest, both of which had been prescribed by this Commission, one prior to the institution of the present proceeding and the other during the pendency of the proceeding. The first, referred to

herein as the *Oklahoma scale,* was prescribed July 6, 1925, in *Oklahoma Corporation Commission* v. *A. & S. Ry. Co.,* 101 I. C. C. 116, and applied between Oklahoma and Texas, also between Oklahoma and Kansas, Missouri, and Arkansas. The second, referred to herein as the *Louisiana scale,* was prescribed June 17, 1927, in *Oklahoma Millers' League* v. *A. & M. R. R. Co.,* 128 I. C. C. 523, for application only between Oklahoma and points in Louisiana west of the Mississippi River. This latter scale related the grain rates to the class rates, whereas the *Oklahoma scale* applied in a more extensive territory and bore no relation to the class rates.

The *Louisiana scale* applies to both joint and single-line hauls over the shortest possible routes, and provides for coarse grains 87.5 per cent of the wheat rates, whereas the *Oklahoma scale* is higher for joint-line than for single-line hauls up to 500 miles and the same for hauls over 500 miles. It also applies over the shortest three-line routes and provides for coarse-grain rates 90 per cent of the wheat rates. Since this scale is applicable throughout a much wider territory than the *Louisiana scale,* it is a better guide as to what the Commission's order here did to the grain rates in the Southwest.

Assuming that, as stated by appellants, the rates prescribed herein will reduce the *Louisiana scale* 15 per cent on wheat only, with little or no change in coarse-grain rates, we say this: Had appellants compared the prescribed southwestern scale with

the previously prescribed *Oklahoma scale* they would have found that on wheat the rates now prescribed for hauls over 600 miles and which are the distances grain from Oklahoma to Texas would move, are 93 per cent at 600 miles, 97.3 per cent at 700 miles, 101 per cent at 800 miles, and considerably higher for all distances over 800 miles than the previously prescribed *Oklahoma scale.* On coarse grains the prescribed rates are the same as the *Oklahoma* single-line scale at 500 miles, and for all distances over 600 miles are higher than the previously prescribed *Oklahoma-scale* rates. (101 I. C. C. at page 137; 164 I. C. C., page 822.) The order here involved prescribes rates on coarse grain the same as on wheat.

A heavy volume of coarse grains moves between Oklahoma and Texas. Therefore, when it is again remembered that the then rates were unlimited as to the number of free transit stops, free inspections, and wasteful out-of-line and b[illegible]haul service, as compared with the restrictions and limitations imposed by this order, it can not be contended that the prescribed rates will deplete the carriers' revenues. In fact, the reverse should be true, particularly having in mind that wasteful transit practices are especially characteristic of the Southwest. (R. 159, 110.)

Appellant's brief (68), referring to rates from southeastern Missouri to Cairo which Cairo had specifically claimed "to be unduly high as contrast-

ed with the rates from [should be to] St. Louis, East St. Louis, and Memphis," states that the Commission found undue prejudice which would be remedied by the rates prescribed. The remedy, so appellants say, "was brought about by materially reducing all of the rates, whether on wheat or coarse grains, to Cairo. (App. D, R. 258.) Many other illustrations could be given. It is correct, at least with few exceptions, that all rates to Cairo were reduced. But the remedying of the situation was not one-sided. Despite the fact that level as well as relation entered into the adjustment, many wheat rates from Southeastern Missouri to St. Louis and Memphis were increased or kept the same and coarse-grain rates to those points were for the most part increased. (R. 258, 259.)

It has already been mentioned that appellants have even attempted to draw an analogy between this case and the Commission's decision in the *Deciduous Fruit Case, supra*, which was reversed by this Court. Whatever similarity may exist, there is of course the one all-important distinction that that case had been reversed before the Commission's determination in this case and on the very error which appellants charged the Commission to be guilty of again. Furthermore, the Commission's order in the earlier case did in fact reduce identical rates that had theretofore recently been found not unreasonable. (*Deciduous Fruit Case,*

281 U. S. 658, 665, 666), whereas the instant decision, in prescribing the level and relation of rates throughout western territory and Illinois, merely embraces certain rates recently fixed or considered. In this connection it is important to keep in mind the matter of rate relation. When called upon to make territorial adjustments, the Commission seldom finds that its earlier piecemeal adjustments conform to the broader structure later found lawful. In fact, as stated by the Commission in its report, the piecemeal adjustments here involved were in part responsible for the general maladjustment. Local and territorially restricted adjustments must necessarily be subordinated to broad and comprehensive revisions which embrace them.

C. Appellants' statement that the Commission did give consideration to Section 15a is correct; their statement that the Commission's duties under Section 15a are to be performed in the carrying out of its power to prescribe just and reasonable rates, is also correct; but their position, in substance, that the Commission reached its determination under a supposed duty to favor agricultural products instead of in the exercise of its power to fix just and reasonable rates is (as under all chapters of their brief) incorrect.

Section 15a (2) of the Interstate Commerce Act reads as follows:

> In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or terri-

> tories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

We agree with appellants' position (Br. 97) that the Commission's duties under Section 15a are to be performed in the exercise of its power under the provisions of the Interstate Commerce Act to prescribe just and reasonable rates. We agree with appellants' statement that the Commission did consider Section 15a, (Br. 81) and assert that it did so in the exercise of its power to fix just and reasonable rates. This will be shown presently. Appellants' contention in connection with Section 15a is the same as relied upon throughout their brief, namely, that the Commission did not reach its determination under provisions of the Interstate Commerce Act, but under a supposed duty to treat agricultural products as a favored class. This, we understand, is what appellants mean by their constant reference to the lowest possible lawful rate.

In arriving at a reasonable rate there are many factors to be considered and much evidence thereon to be weighed, but when the Commission reaches its determination as to what is the reasonable rate, that and none other is the reasonable rate. If, as in the *Deciduous Fruit Case,* it reaches such a determination under the then supposed duty to treat agricultural products affected by depression as a "favored class," a factor enters into this determination which results not in a reasonable rate under the Interstate Commerce Act or any other valid law, but in an unreasonable and unlawful rate. In support of their contention that this latter is what the Commission did appellants again set forth the Commission's reports which were entered prior to this court's decision in the *Deciduous Fruit Case,* and again including the Commission's report which was reversed in that very case. Appellants, as we conceive it, have interpreted the court's decision correctly. The Commission's sole function is the administering of the Interstate Commerce Act and related Acts as interpreted by this court when such interpretations have been made. Because of its prior misconceptions of the law the Commission in this case gave express notice that it was following the teaching of the court in the then recently announced decision in the *Deciduous Fruit Case.*

In its report the Commission stated that the question presented is whether, "under present

conditions, the rates on grain and grain products throughout the western district are reasonable and just and are properly related to each other and to the rates on other traffic. The answer must take into account not only comparisons of distance, transportation conditions, and ton-mile and car-mile earnings on grain and other commodities, but also whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by law, including section 15a of the interstate commerce act, which we construe to permit, but not to guarantee, the carriers to earn 5.75 per cent on the fair value of the property devoted to the transportation service" and that the "record requires a general survey of the rates on grain and grain products throughout the western district from the standpoint not only of cost, but of general transportation conditions as well. The relation of rates, as well as the general level, is within the scope of the investigation."

The Commission's statement that it construed Section 15a to permit, but not to guarantee, the carriers to earn a 5.75 per cent return on aggregate property value, is made much of by appellants, but it seems entirely clear that this statement has reference to the words of Section 15a, that rates are to be adjusted so that the aggregate net railway operating income shall equal "as nearly as may be" the fair net return. The Commis-

sion's experience growing out of the large increases authorized following Federal control in *Increased Rates, 1920*, 58 I. C. C. 220, accounts for its statement to which appellants take exception. In *Rates on Grain, Grain Products and Hay*, 64 I. C. C. 85, the Commission said, at page 99:

> The purpose of section 15a was undoubtedly to better stabilize the credit of railroads, reassure investors, and attract capital to the railroad industry. It is plainly our duty to do everything in our power to carry out this purpose. The experience of the past 12 months, however, has shown the limitations which surround in actual practice the operation of this provision of the law. The increases of 1920 were intended to give the carriers the specified return, and no doubt they would have done so if the volume of traffic had remained normal. Instead, it fell off sharply, and net earnings failed by a considerable margin to reach the desired mark. Nevertheless, when it became apparent that this would be the case, carriers and shippers alike agreed that it was not our duty, under section 15a, to raise rates to still higher levels. To have done this would clearly have been a vain thing, harmful alike to the country and to the carriers. The rate adjustment can not with advantage be made dependent upon fluctuations of traffic.
>
> It is also to be noted that the duty cast upon us by section 15a is a continuing duty and looks to the future. It does not consti-

tute a guaranty to the carriers, nor is the obligation cumulative. * * *.

As above said, appellants' position is that the Commission's duties under Section 15a are to be performed "in the exercise of its power to prescribe just and reasonable rates." (Br. 88.) That very thing, is of course, stated in the opening words of Section 15a (2). The words "power to prescribe just and reasonable rates" refer back to the provisions of Section 15 (1), which empower the Commission upon finding rates to be unjust and unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of the Act, to determine and prescribe what will be the just and reasonable rates to be thereafter observed. Thus the rate adjustments referred to in Section 15a relate to Sections 2 and 3 of the Act as well as to Section 1, and, for that matter, to adjustments of rates found violative of any other provision of the Act.

Accordingly, the Commission has done just what is required in connection with Section 15a, as well as the other sections of the Act here involved; and just what appellants assert that it is empowered to do and was its duty. That is, the Commission found rates to be unreasonable and unduly preferential and prejudicial and prescribed the just and reasonable rates for the future. And this it did after stating that in determining its problem it "must take into account not only comparisons of

distance, transportation conditions, and ton-mile and car-mile earnings on grain and other commodities, but also whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by the law, including Section 15a"; after stating that the record required a general survey of the rates from the standpoint not only of cost but of transportation conditions as well, the relation of rates as well as the general level being within the scope of the investigation; after setting forth tables showing the carriers' returns for a period of years on book investment, after discussion of five cost studies "purporting to represent the lowest scale of rates that would be justified by consideration alone of cost of service plus a six per cent return on that part of the property assignable to movement of wheat, and purporting to show also that rates could be materially reduced from the standpoint of cost of service." (R. 80.) In respect of these studies, among other things, the Commission said (R. 81):

> It will be understood that under the theory of these analyses the showing as to any grain or grain product will be duplicated as to any other commodity of the same loading irrespective of relative values and densities of tonnage; that the distance scale reflecting this analysis makes no provision for competitive routes of varying mileages or for differences in character of country, density

of traffic, or other incidents of transportation; and that, in order to compensate for these contingencies, the scale would have to be increased. The carriers criticize the analyses for not taking into consideration these and many other things, such as the character of equipment required, the assembling of empty cars for wheat movement, the furnishing of grain doors, etc., which are important items of cost.

The contention is not advanced in connection with any of these analyses that rates should be based solely on the cost of service. It was not denied by the proponents of these studies that other considerations should also be given weight, and that the proposed distance scales merely represented, as already stated, levels of charge that would not be considered too low from the standpoint alone of the cost of service plus a 6 per cent return on investment. The Kansas farm organizations, which actively participated in this inquiry, while fully adopting the theory and results of the interstate study, expressly rejected any proposal to make rates solely on the basis of cost, and proposed a scale of rates on wheat which is substantially higher than the scale proposed in that analysis.

It is apparent from the above, and from the other statements of the Commission above given, that not only the showing of the cost studies but many other elements entered into the Commission's determination. In the absence of the record such elements and evidence thereon can not be shown,

but under the rule of this court it must be assumed that the evidence supported the Commission's determination that the theretofore rates were unreasonable and unduly preferential and prejudicial and that the rates prescribed were the just and reasonable rates to be thereafter observed.

Appellants contend that in such a case as this dealing with the rates on an important class of traffic covering two rate groups, Section 15a contemplates a specific finding that the rates were so high as to cast an undue burden on the grain traffic as contrasted with other traffic under a rate structure sufficient to yield a fair rate of return out of all traffic. But Section 15a makes no requirement of such precise finding, for as recognized by appellants the Commission's duties thereunder are to be performed in the exercise of its power to prescribe just and reasonable rates. Appellants urge that the relating of rates to other rates at a time when the carriers are shown not to be earning the return to which they are entitled, could not result in rates which would yield on a particular traffic its proper proportion of the return to which the carriers are entitled. First off, this assumes that the rates were fixed by mere relation to other rates whereas cost studies and many other factors are shown to have entered into the determination even on the face of the report. In the absence of any allegation that the order was unsupported by evidence, and in the absence of the record, it follows

that the order must be taken as supported by the evidence.

Moreover, appellants' argument assumes much. Although final valuations have not been available, the Commission, since Transportation Act, 1920, has prescribed rates with its duty in mind of promoting an adequate transportation system. This is evidenced by the large horizontal increases authorized in *Increased Rates, 1920,* 58 I. C. C. 220, which for sound transportation reasons above mentioned (p. 67) were in part reduced pursuant to authority in *Reduced Rates, 1922,* 68 I. C. C. 676. It is shown by cases which appellants themselves mention. (Br. 84, 85.) As to rates voluntarily established, it would seem that they would have been fixed to the best of the carriers' judgment to yield "as nearly as may be" their proper proportion of carrier return. In short, appellants' argument would assume that, in fixing rates, other rates have no evidential value unless the ideal of exact return on exact value is being realized in a rate group. In any event here there was a full record of all kinds of evidence. The just and reasonable rates fixed in this case, with all considerations present, constitute rates which will bear their fair burden of the return to which the carriers are entitled, in so far as the administrative judgment of the Commission enabled it to arrive at such result.

This case well illustrates that the Commission can not reconstruct the country's rate structure as

a whole. It could not do that even as to a rate group because, as is shown here, rates on traffic which is competitive have to be properly related regardless of any rate grouping. In short, general reconstruction of the rate structure has to be undertaken, having due regard to the sections of the country where rates on the particular traffic should be properly related to each other. The size of this record shows that all rates of the country as a whole could not be undertaken in one proceeding. As stated in the *New England Divisions Case*, 261 U. S. 187, 197,

> Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed.

Appellants concede that Section 15a does not prohibit the Commission from reducing an unreasonable rate, even though the carriers' returns may be inadequate. (Br. 98.) And, of course, if the Commission uncovers an unreasonable rate during its task of reconstructing the country's rate structure, it must reduce that rate to a reasonable level, for otherwise it would be perpetuating the condition.

The Hoch-Smith Resolution, however, requires the Commission to undertake the task of reconstructing all rates of the country. And although valuations have not been completed, the Transportation Act looks to the Commission to do all that it can to maintain an efficient transportation service. The Commission's determination in this

case gives effect to its best administrative judgment on the problem presented."

(1) The order effected great economies under the line haul rates, and the general increases in rates on coarse grains went mostly to carriers in special need thereof.

At the close of its report the Commission said:

> While the reductions far exceed the increases, and the corresponding revenue effects will be substantial, the full effect upon revenues can not be adequately foretold, in view of the limitations upon transit, the elimination of transit balances outbound from primary markets, and the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates. We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation. We say this especially in the light of increased revenues already granted in certain other cases, and in the realization that a failure of the present revision to afford adequate revenues will prompt further proceedings.
>
> It would be impossible to take any comprehensive action without adversely affecting certain of the conflicting interests upon this record. Nothing but experience can demonstrate what the effect will be regarding certain of these issues. We therefore invoke the aid of carriers in establishing the rates herein prescribed with the greatest possible expedition in order that this new rate structure may receive a speedy test.

The Commission's sworn answer denied the allegation of the petition that the reductions in rates would result in revenue loss of $20,000,000 annually. (R. 568.) As above shown its report said that "the revenue effects will be substantial" but that is qualified by the statement that the full effects upon revenue could not be foretold in view of the elimination of transit balances from primary markets and limitations imposed upon "transit." By the latter the Commission was referring to the limitation to two free stops in transit, all others to be paid for, the abolishment of the "unit rule" and the general condemnation of wasteful transit practices. The burden imposed on the line haul rates by these wasteful practices has already been pictured in so far as shown on this record. And it will be recalled that under Section 15a rates are to be adjusted so that the carriers will under efficient and economical management earn the prescribed return. As to the elimination of transit balances lower than the proportionals the Commission had expressed the belief that this would not only preserve but substantially increase carriers' revenues through primary markets even with substantial reductions in the flat inbound and proportional outbound rates. This it thought would result despite any change in the channels of movement resulting from the elimination of overhead rates with transit. (R. 643.)

Appellants mention that certain of the rates had recently been found to be reasonable, but they lose sight not only of the fact that rate relations were

readjusted over a vast territory but also of the fact that the former rates covered a great amount of wasteful service.

Attention is also again called to the wide increases effected in rates on coarse grains. At pages 82 to 84, inclusive, of their brief, appellants reproduce in its entirety that portion of the discussion in the Commission's report (R. 77, 78) which deals with the financial condition of the carriers in the western district. In that discussion it is said that for 10 railroads (shown in the footnote on page 83 of appellants' brief) having 75 per cent or more of their mileage in western trunk-line territory the average rate of return on book value was 2.97 per cent in 1927. With the single exception of the Oregon-Washington Railroad & Navigation Company, which operates in the Pacific Northwest, this is the poorest showing of any of the carriers referred to.

The Court will observe that the 10 railroads mentioned operate mostly east of the Missouri River, in the territory where coarse grains predominate (R. 207) and where the rates on such traffic have been increased. The importance of the coarse-grain traffic to these carriers is explained on page 651 of the Commission's report (R. 101) as is also the proportion of the coarse-grain production to the total grains produced. For example, it will be noted that on the Chicago & Northwestern, one of the 10 carriers named, coarse grains were 70 per cent of its total grain traffic. A glance at a railroad

map will show that the great bulk of this carrier's lines are in Iowa, Minnesota, and Wisconsin, where, as already stated, the coarse-grain rates have been substantially increased.

In the same discussion, the Commission also said:

> The carriers point out that the unfavorable financial showing among the carriers is most pronounced with the important coarse-grain carriers, whose rates were most affected by that reduction. [Referring to reductions in a previous case, 64 I. C. C. 85.]
>
> A comparison of operating results does suggest that the relatively low level of coarse-grain rates is at least partially responsible for the unfavorable financial showing of the coarse-grain carriers, especially in western trunk-line territory. For instance, in a group of 21 carriers with combined annual freight revenues of approximately $2,000,000,000, 9 of them, with relatively low coarse-grain tonnage, exceeded their statutory return by nearly $35,000,000, while the other 12, with a large coarse-grain tonnage, were short of their statutory return by more than $75,000,000. (R. 101, 102.)

The above indicates that when this case was decided at least nine of the important so-called wheat carriers were making in excess of 5¾ per cent. It also shows that, by increasing the rates on coarse grains, consideration was given to the special needs of the so-called coarse-grain carriers.

This analysis, even as available on the face of the report, taken together with the elimination of waste above mentioned, shows that there were sound reasons behind the Commission's statement that it was "satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation." The fact that it was so satisfied, coupled with the impossibility of accurately forecasting what would result, was clear warrant for the Commission's suggestion that the radically changed rate structure and practices thereunder be given a reasonable trial, after which situations requiring further consideration might be brought to its attention. This procedure has met with the implied approval of this court in *R. R. Comm. of Wisconsin* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 591, and in *New England Divisions Case*, 261 U. S. 184, 201. Compare *Darnell* v. *Edwards*, 244 U. S. 569, 570; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 18; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 54; *Louisville* v. *Cumberland T. & T. Co.*, 225 U. S. 430.

In the second case cited the court said:

> A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently, and although the tribunal is convinced, when entering the order thereon, that upon further investigation, some changes in it will have to be made. To grant under such circumstances immediate relief, subject to later readjustments, was no

more a transfer of revenues pending a decision than was the like action in cases involving general increases in rates, a transfer of revenues from the pockets of the shippers to the treasury of the carrier. That the order is not obnoxious to the due process clause, because provisional, is clear. If this were not so, most temporary injunctions would violate the Constitution.

II. THERE WERE NO IRREGULARITIES IN THE COMMISSION PROCEEDINGS

At the close of its report the Commission, in commenting upon the revenue effects of the reductions and increases ordered, stated that it had made many different checks and estimates, and in connection with the statement that maintenance of adequate transportation service would not be endangered it said: "We say this especially in the light of increased revenues already granted in certain other cases * * *."

Appellants contend that the Commission's reference to checks and estimates and to increases already granted brings the situation within the doctrine that parties must be apprised of evidence used so that they may have an opportunity to cross examine or rebut. *Int. Com. Com.* v. *L. & N. Ry.*, 227 U. S. 88; *United States* v. *Abilene & Southern Ry.*, 265 U. S. 274.

The checks and estimates referred to by the Commission were of course in respect of matter put into the record as to which appellants had had

their opportunity of cross-examination and rebuttal. A charge of denial of due hearing can not be predicated upon the fact that appellants were not allowed opportunity of cross-examination and rebuttal in respect of the step-by-step mental processes entering into the Commission's determination.

As to the Commission's mention of increases already made in other parts of its general investigation, it is going far to say that the Commission could not, or indeed should not, have had in mind such increases. The revenue results of those increases could not, it is true, be definitely known in advance of trial. But that was also true of the reductions and increases in the present case. The carriers had had due hearing in the proceeding in which the increases were granted. Surely there was no denial of due hearing to the carriers because the Commission did not divorce its mind of the fact that those increases had been made any more than there was denial of due hearing to shippers because the Commission in ordering in those increases did not, it may be assumed, close its eyes to the fact that the reductions here involved had been ordered.

III. THERE WAS NO ABUSE OF DISCRETION BY THE COMMISSION IN DENYING THE SEVERAL MOTIONS FOR REHEARING AND RECONSIDERATION

Appellants' brief devotes a chapter to the Commission's denial of their petitions for rehearing and

reconsideration, which they assert constituted an abuse of discretion.

In most of its larger proceedings the Commission is confronted with petitions for rehearing and reconsideration based, similarly as here, on alleged changed conditions. The statute necessarily leaves the matter of reopening to the discretion of the Commission. (Sec. 16a, I. C. Act.) Sound reasons must appear therefor, because reopening may mean further long drawn-out proceedings with the possibility that when the Commission again reaches a determination it will be again petitioned on the same grounds.

The special reason advanced by appellants for rehearing was the falling off of their revenue due to diminishing traffic, which in turn was due to sharp general industrial depression. At the same time appellants call attention to the *Fifteen Per Cent Case*, 1931 (Ex Parte 103), 178 I. C. C. 539, in which the Commission, although denying the horizontal increase asked for, suggested to the carriers certain measures to meet the situation. The contention is then in reality that, with respect to a situation calling for general emergency relief, the Commission abused its discretion in not reopening a particular docket wherein a determination had been reached after regularly conducted hearings. The question involved in the *Fifteen Per Cent Case* was how general emergency relief could best be given without further depressing business, traffic,

and revenues, and without disturbing rate relationships, interstate and state, which to many shippers are more important than the level of rates. That question of general emergency relief is not the question here.

The determination here involved was reached after more than a year of hearings, and another of study, and on a record, in the making of which carriers and shippers throughout western territory cooperated to the full. The readjustment was urgently needed, correcting as it did not only the level but the relation of rates and discriminatory and wasteful practices under the rates. The increases in coarse-grain rates went generally where most needed. Unquestionably reopening would have meant further lengthy proceedings, since the very condition of diminishing traffic would have been used in evidence and argument against a higher level of rate; and when a new determination had been reached general conditions might again have become normal.

In performing its legislative function of prescribing reasonable rates the Commission necessarily projects into the future the results of a decision based on the conditions disclosed in the record. That determination can not reflect accurately fluctuating conditions.

Even in the record brought here there is much to show that the petitions for rehearing were rightly denied, and in view of the absence of the evidence

before the Commission, it would seem that it should be concluded, not only that the Commission did not abuse the discretion reposed in it, but further that the evidence as a whole impelled denial of the petitions for rehearing.

CONCLUSION

The decree of the lower court denying the application for preliminary injunction should be affirmed.

THOMAS D. THACHER,
Solicitor General.
JOHN LORD O'BRIAN,
The Assistant to the Attorney General.
DANIEL W. KNOWLTON,
Chief Counsel.
E. M. REIDY,
H. L. UNDERWOOD,
For Interstate Commerce Commission.

APPENDIX (THE STATUTES INVOLVED)

The following provisions of the Interstate Commerce Act (U. S. Code, Title 49, Chap. 1) are important in the consideration of this case:

Section 1 (5):

> All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. * * *.

Section 3 (1):

> That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 15 (1):

> That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by

the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed; and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be,

and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Section 15a (2) and (3):

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation. * * *

Hoch-Smith Resolution (Joint Resolution of January 30, 1925, U. S. Code, Title 49, Sec. 55):

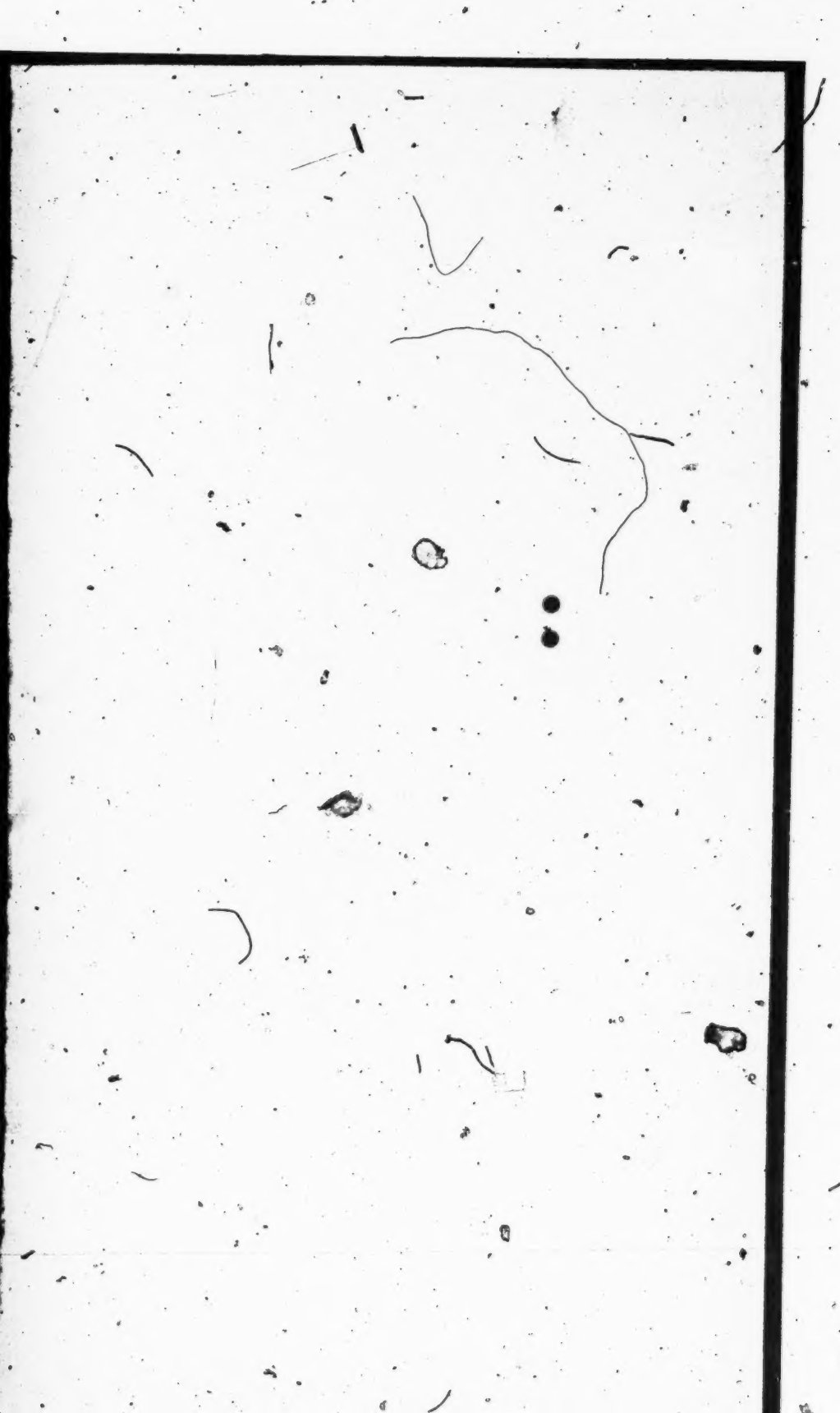
That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.

That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution, the Commission shall give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation. In the progress of such investigation the Commission shall, from time to time, and as expeditiously as possible, make such decisions and orders as it may find

to be necessary or appropriate upon the re
ord then made in order to place the rat
upon designated classes of traffic upon
just and reasonable basis with relation
other rates. Such investigation shall
conducted with due regard to other inves
gations or proceedings affecting rate a
justments which may be pending before t
Commission.

In view of the existing depression in agr
culture, the Commission is hereby direct
to effect with the least practicable del
such lawful changes in the rate structu
of the country as will promote the freedo
of movement by common carriers of t
products of agriculture affected by that d
pression, including livestock, at the lowe
possible lawful rates compatible with t
maintenance of adequate transportati
service: *Provided*, That no investigation
proceeding resulting from the adoption
this resolution shall be permitted to del
the decision of cases now pending before t
Commission involving rates on products
agriculture, and that such cases shall
decided in accordance with this resolutio

U. S. GOVERNMENT PRINTING OFFICE



FILE COPY

FILED
NOV 24 19
CHARLES ELMORE

No. 287.

In the Supreme Court
of the United States
OCTOBER TERM, 1931

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al., *Appellants*,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION et al., *Appellees*.

BRIEF OF APPELLEE,

The Public Service Commission for the State of Kansas, J. W. Greenleaf and Thurman Hill, Members.

CHARLES W. STEIGER,
State Capitol Building, Topeka, Kan.,
Solicitor for Appellee.

RALPH MERRIAM,
231 South La Salle street, Chicago, Ill.,
Of Counsel.

14-1978

INDEX.

Page

STATEMENT 5
The Public Service Commission for the State of Kansas 5
The Proceedings before the Interstate Commerce Commission 6
Preliminary View of the Case as a Whole 9
POINTS AND AUTHORITIES 15
SUMMARY OF ARGUMENT 17
ARGUMENT 19
There is nothing in the sworn petition, exhibits, or affidavits of the appellants, or in the answers of other parties, or in the main opinion or order of the Commission, or in the separate and concurring opinions of individual commissioners, or in the aura of facts and circumstances surrounding the action of the Commission involved, or in any other part of the record before this Court, to support or warrant an inference that the Commission in its decision under review abused its discretion or misinterpreted, misapplied, ignored or disregarded any of its legal powers, duties or functions in disposing of the issues embraced in its investigation of the rate structure on grain and grain products 19
No legal error or abuse of discretion may be imputed to the Commission from the mere fact that rate reductions were made when the carriers were not receiving the assigned net return 19
"Ignoring" section 15a 21
The alleged transcendency of section 15a as portrayed by the carriers 27
The theory of the carriers as a repudiation of the Commission's work in the last decade 29
Earnings of important grain-carrying lines in excess of 5.75 per cent 31
Fettering the Commission with a single and supreme fiat 32
Giving section 15a its due proportionate weight 35
Section 15a as it confronts the inherent weaknesses in the national transportation system 36
Section 15a versus economic law 38
The Commission as a mathematical calculator of the net return 41
The worth of the service as a limitation on freight rates 42
No magic in section 15a 45
Business hazards surrounding the national system of transportation 47
The words "as nearly as may be," and their deeper significance 49

Page
The "zone of reasonableness" and the issues herein 51
Section 15a not construed by the Commission as a "mere permission" 56
The Commission's alleged indefinite standard 57
Duty of the Commission to consider section 15a 59
The Commission's conceptions of section 15a as indicated by its decision on the recent general rate increase application 61
The alleged proof that the Commission misapplied the Hoch-Smith resolution 69
The alleged lack of discussion of evidence and of evidentiary findings 75
Comparison with previous decisions of the Commission involving grain rates 77
Expressions in the concurring opinions 82
Commissioner Eastman's opinion 82
Remarks of Commissioner Meyer 83
Other commissioners' separate opinions 90
Overemphasis of section 15a as engendering legal error 90
The Commission's denial of petitions for rehearing 93
Matters outside the record 95
The shifting contention of appellants 96

TABLE OF CASES CITED.

Ann Arbor Ry. Co. v. United States, 281 U. S. 658 ..... 58, 67, 70, 72, 89
American Express Co. v. South Dakota, 244 U. S. 624 53
Baer Bros. Mercantile Co. v. Denver & Rio Grande Railroad Co., 233 U. S. 479 15
California Growers' & Shippers' Pro. League v. S. P. Co., 129 I. C. C. 55 ... 57, 73
California Growers' & Shippers' Pro. League v. S. P. Co., 100 I. C. C. 79 ... 73
Chicago I. & L. Ry. Co. v. United States, 270 U. S. 287 ..... 15, 21
Covington & Lexington Turnpike v. Sandford, 164 U. S. 578 ..... 32, 66
Dayton-Goose Creek Ry. v. U. S., 263 U. S. 456 ..... 63, 67
Fifteen Per Cent Case, 1931, Ex. Parte No. 103, 178 I. C. C. 539 61
Hoch-Smith Resolution 58, 59, 70, 71, 85
Increased Rates, 1920, 58 I. C. C. 220 29
Interstate Commerce Act 24
Interstate Commerce Commission v. Ill. Central R. R. Co., 215 U. S. 452 .. 15
Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541, 15
Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194 .. 15

	PAGE
Interstate Commerce Commission v. A. M. Ry. Co., 168 U. S. 141	15
Kansas Public Utilities Commission v. A. T. & S. F. Ry. Co., 83 I.C.C. 105,	71
Kansas City Transportation Bureau v. A. T. & S. F. Ry. Co., 16 I.C.C. 195,	80
Kansas City Southern Ry. Co. v. United States, 231 U. S. 423	15
Louisville & Nashville Railroad v. Garett, 231 U. S. 298	15
Louisville & Nashville Railroad v. United States, 245 U. S. 463	15
Manufacturers Ry. Co. v. United States, 246 U. S. 457	15
The Minnesota Rate Cases, 230 U. S. 352	15
New England Divisions, 66 I. C. C. 196	38, 58
New England Division Case, 261 U. S. 184	15, 21
Ogden Grain Exchange v. Arizona Eastern Co., 126 I. C. C. 255, 128 I. C. C. 490, and 132 I. C. C. 46	77, 78
Ogden Grain Exchange v. Abilene & Southern Ry. Co., 122 I. C. C. 691	78
Oklahoma Millers' League v. A. & M. Ry. 128 I. C. C. 523	79
Oklahoma Corp. Com. v. A. & S. Ry. Co., 101 I. C. C. 116	79
Reduced Rates, 1922, 68 I. C. C. 676	13, 29, 31, 65
Railroad Com. of Iowa v. Director General, 63 I. C. C. 405	81
Railroad Comm. of Wisconsin v. C. B. & Q. R. R. Co., 257 U. S. 563	59, 64
Rates on Grain, Grain Products and Hay, 64 I. C. C. 85	13, 29
Rates and Charges on Grain and Grain Products, 91 I. C. C. 105	71
Rodney Milling Co. v. St. L. & S. F. Ry. Co., 147 I. C. C. 569	79
Smyth v. Ames, 169 U. S. 466	32, 65
State of Florida v. United States, 282 U. S. 194	24, 65
Southern Pacific Co. v. Interstate Commerce Comm., 219 U. S. 433	82, 83
St. Louis & O'Fallon Ry. Co. v. United States, 279 U. S. 461	82
Prentis v. Atlantic Coast Line Co., 211 U. S. 210	15
Pennsylvania Co. v. United States, 236 U. S. 351	15
United States v. New River Co., 265 U. S. 533	15, 21
Virginian R. Co. v. U. S., 272 U. S. 658	15, 20
Wilcox v. Consolidated Gas Co., 212 U. S. 19	32

In the Supreme Court

of the United States

OCTOBER TERM, 1931

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al., *Appellants*,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION et al., *Appellees*.

No. 287.

BRIEF OF APPELLEE,

The Public Service Commission for the State of Kansas, J. W. Greenleaf and Thurman Hill, Members.

STATEMENT.

The opinion of the court below (R. 698) will be found in 51 Fed. (2d) 510.

1. The Public Service Commission for the State of Kansas.

The Public Service Commission for the state of Kansas is a public corporation and administrative tribunal under the laws of the state of Kansas. It is the duty of the Commission to regulate the rates of all common carriers by railroad applicable to the movement of intrastate traffic within the state and to proceed in the manner prescribed by law to fix and establish such rates upon a just and reasonable basis. The Commission is by statute authorized and directed to appear before the Interstate Commerce Commission

in proceedings affecting the interests of the people of Kansas, to bring complaints of violations of the interstate commerce act, and otherwise to secure for the people of Kansas just, reasonable, and lawful interstate rates.

The interstate rates on grain and grain products in the said state bear an important relation to rates on the same commodities moving in intrastate commerce within the state, and the level of interstate rates will in a large measure control the Commission in the fixing and determining of reasonable and lawful intrastate rates upon the same commodities.

In pursuance of the terms of section 13 (3) of the interstate commerce act, the Interstate Commerce Commission availed itself of the services, records, and facilities of the Kansas Commission, and that Commission by and through its duly authorized commissioners and representatives attended the hearings had in the investigation upon grain and grain products from the time the investigation was started until ended.

The production of grain and grain products within the state of Kansas is a basic industry of the state. In accordance with the record before the Interstate Commerce Commission the average annual movement of winter wheat originating in the state is one hundred and fifty million bushels, approximately one-fifth of the annual average production within the United States.

2. The Proceedings Before the Interstate Commerce Commission.

This is an appeal from a decision of the district court refusing to enjoin an order of the Interstate Commerce Commission made and entered July 1, 1930, as modified by a supplemental order made and entered April 10, 1931, in a proceeding entitled "Grain and Grain Products Within the Western District and for Export," No. 17,000, Part 7 (R. 69 to 326).

By an order made and entered on March 12, 1925, (R. 15 to 49) the Commission instituted of its own motion an investigation of the rate structure of common carriers subject to the interstate commerce act, pursuant to a resolution of congress, approved January 30, 1925 (43 Stat. L. 801), commonly referred to as the Hoch-Smith resolution. The proceedings under review are designated Part 7 of this general investigation and involve all the rates for the transportation of grain and grain products between points in the Western District and from all points in the United States to the several ports for export. There were pending at the time a number of formal complaints of various parties brought under the interstate commerce act, some thirteen in all, which had not as yet been heard and which were, by notice dated December 30, 1926, assigned for hearing with No. 17,000, Part 7 (R. 57 to 68). Later, other pending formal complaints which had advanced beyond the point of hearing were consolidated with No. 17,000, Part 7, and the report and order herein determine all such other proceedings.

While the investigation was instituted in compliance with the Hoch-Smith resolution, the inquiry was into any "violation of any provision of law, including the joint resolution aforesaid" (R. 47).

Hearings in the investigation began at Dallas, Tex., May 9, 1927, and later hearings were held at Wichita, Kan., Minneapolis, Minn., Chicago, Ill., Seattle, Wash., Portland, Ore., and Los Angeles, Cal., the record being closed on September 22, 1928. In all, the hearings occupied a period of several months, and the transcript of testimony was in excess of 53,000 pages, together with more than 2,100 exhibits of documentary material (R. 147).

A large number of interests entered appearances in the proceeding as shown on pages 620 to 625, inclusive, of the Commission's report (R. 70 to 75), and the issues were numerous and varied, embracing three score and more of major issues (p. 697 of report,

R. 147), which implies a much larger number of issues of less importance.

The Commission served upon the parties, on April 20, 1929, a report proposed by two of its examiners, and thereafter, on May 27, 1929, entered upon a hearing of oral argument of the parties lasting for three weeks. The briefs, exceptions and other written argument amounted to more than 20,000 printed pages (p. 697, R. 147).

The investigation was formally instituted as provided by section 13 of the interestate commerce act, a full hearing was had as required by said section, and the Commission on July 1, 1930, made and entered its report and order, finding the existing rates to be unjust, unreasonable, and excessive and in their relation to each other unduly prejudicial and unjustly preferential, and required the carriers, in lieu of the existing rates so found to be unlawful, to cease and desist from maintaining and charging such rates and to establish, on or before October 1, 1930, and put in force and thereafter maintain just and reasonable rates and rates otherwise lawful. The prescribed rates in some instances were higher and in other instances lower than the then existing rates.

Thereafter, upon successive petitions of the defendant carriers, the effective date of the order was postponed to January 1, 1931, then to April 1, 1931, and finally to June 1, 1931. In the meantime the Commission had, on April 10, 1931, issued its supplemental report and order requiring the rates as therein modified to become effective on said date of June 1, 1931.

Pending its consideration of the case, the district court stayed the order of the Commission for sixty days, but upon rendering its decision denied the relief prayed for by appellant carriers and dismissed their bill, from which decision this appeal was brought.

3. Preliminary View of the Case as a Whole.

Before taking up the carriers' presentation in detail we should like to present a brief view of the case as a whole.

Perhaps the best answer to the contentions of the appellant carriers in this case is the report of the Commission itself. It seems to us more calm and guarded in tone than the statements of the carriers. We believe that a perusal of the Commission's report will go far to satisfy the mind of the court that the matters brought by the carriers to its attention in this proceeding have been magnified into undue importance in view of the great and fundamental questions with which the Commission was confronted in its undertaking of a revision of the grain rates in the immense territorial expanse involved. The language of the Commission's report is characterized by the brevity, precision and condensation which should prevail in the decisions of administrative and judicial tribunals when they are dealing with issues and principles of overshadowing magnitude, and where a single sentence in the opinion expresses a conclusion requiring perhaps weeks of careful analysis and reflection upon the facts and conditions involved. The report of the Commission in this case is in itself revelatory of long and profound thought by the Commission on the issues and the immense record confronting it in its investigation of the rates and practices relating to grain and grain products. The reference by the carriers to certain expressions of individual commissioners in their remarks supplementary to the main report should not be allowed to obscure the masterly treatment of the issues to be found in the decision itself, in which the members of the tribunal unanimously concurred.

The carriers in their petition and brief emphasize their conviction that the new rates and practices prescribed by the report will result in the annual loss of revenue to the railroads of from $15,000,000 to $20,000,000 on the grain traffic. This fear colors and

constitutes the background for all of the contentions advanced by the carriers in this proceeding to enjoin the order of the Commission. It is true that $15,000,000 or $20,000,000 is a considerable sum of money, and the carriers are justified in giving it attention. This amount of revenue is, however, relative and should be accorded only its due proportionate significance. In the brief of the carriers it is said that this $20,000,000 represents about 13 per cent of their revenue on grain and grain products and that their revenue on grain and grain products represents about 12.1 per cent of their aggregate revenues on all traffic. From these base figures it may readily be calculated that the total revenues which the carriers say they receive annually on grain and grain products is approximately $153,800,000, and their total annual revenues on all freight traffic approximately $1,271,000,000.

In the year 1924, instanced by the appellants, the total revenues of these carriers derived from all operations, including other than freight service, were $2,231,208,135. (Statistics of Railways, Interstate Commerce Commission, 1924). Appellants have therefore founded their contention as to the alleged radical action of the Commission on the asserted fact that the effect of its report and order is to subtract $20,000,000 annually from a gross revenue of $2,231,208,135. The foregoing figures will, we suggest, aid the court in placing in proper perspective the revenue effects of the Commission's order which the carriers presented with such manifestations of alarm.

Furthermore, the Commission, while it expresses its anticipation that the rates prescribed will result in reductions in the revenues of the carriers, says in its report that in its view it is not possible to determine with precision what the revenue effects of its order will be, and that the results can only be known after a reasonable trial of the new rates. We submit that the carriers are not war-

ranted in representing at this time to the court that the alleged annual reduction of $20,000,000 in their grain revenues will mean an equivalent reduction in their net income, for it is a well-known principle both in transportation and in business generally that net income does not ordinarily vary in direct proportion to changes in gross earnings. The necessity and duty of an increased efficiency in management and in economies of operation are vital factors to be considered where changed economic conditions and reversals of economic trends in a new era of business and transportation call for the revision of freight rates in harmony with what the traffic can reasonably, justly and practically bear.

The facts and information brought to the attention of this court reveal that under direction of a resolution of congress the Commission has for some years been engaged and still continues to be engaged in a general investigation and revision of freight rates in this country on classes and commodities. In its report and order in the grain case it is found that grain and grain products are contributing somewhat more than their just share to the general revenues of the carriers, and it has prescribed rates which the carriers say will reduce their gross revenues by a subtraction of $20,000,000 from $2,231,208,135. Certainly this is on its face a most temperate exercise of the discretion of the Commission in reallocating the revenues of the carriers on the numerous products which they transport. As a matter of first impression and basic presumption the court is clearly called upon to assume that there has been no abuse of discretion by the Commission through its action in the grain case.

The carriers complain of the brevity of the discussion in the report of evidence which they deemed pertinent to their interests. The report in the case at bar occupies with respect to the main opinion 80 pages, with respect to the separate opinions of the com-

missioners 48 pages, and in addition 75 pages of material in the appendices thereto, making 203 pages in all. We ask the court to compare this with the decision of the Commission granting general increases to the carriers in *Increased Rates, 1920,* 58 I. C. C. 220, where the Commission granted horizontal increases on all classes and commodities for the entire country of 40 per cent in the eastern group; 25 per cent in the southern group; 35 per cent in the western group, and 25 per cent in the Mountain-Pacific group, and 20 per cent in passenger rates and fares everywhere, in a report the main opinion of which occupied only 36 pages and the separate opinions of the commissioners 5 pages, making only 41 pages in all. These increases amounted to hundreds of millions of dollars annually. Inasmuch as the latter case involved increases to the carriers, the principal discussion, brief as it was, in the report, related to the evidence of the carriers. In the case at bar a great part of the evidence was presented by parties other than the carriers, and it is but natural that the Commission should devote a major part of its discussion to that evidence. The brevity of the report in *Increased Rates, 1920,* discloses a situation which always confronts the Commission where it is dealing with an entire rate structure over a large territorial domain. It has to deal with great underlying conditions which are general in nature. In so doing the promulgation of a single conception may dispose of a large section of the case. Fundamental principles necessarily are all-inclusive, and they cannot be stated with clearness except in language of brevity and precision. Indeed, a case before the Commission dealing with a small territorial area and with one commodity, such as coal or oil, may require a more extensive report than one of national scope, inasmuch as the Commissioner in the former is called upon to consider a mass of detail in fitting particular rates into the existing general adjustments, whereas in a case like the one at

bar it has all the grain rates before it, no part of the structure stands as a criterion, and it is obliged to consider transportation and economic principles basically and in the abstract in such a way as to call for the application of the broadest and at the same time the simplest of governing principles. In view of the foregoing we submit that in the case at bar the Commission dealt with ample and unusual fullness with the record before it.

Pursuing the same thought, we direct the attention of the court to the decision of the Commission in *Reduced Rates, 1922*, 68 I. C. C. 676, which ordered a general cut of 10 per cent in rates throughout the country, entailing total reductions in revenue many times exceeding the amount of reductions in the case at bar. The opinion is only 71 pages in length.

In *Rates on Grain, Grain Products and Hay*, 64 I. C. C. 85, to which the carriers have referred, the Commission ordered a general reduction of rates in the Western and Mountain-Pacific groups in a report occupying only 21 pages.

In an equity proceeding like the one at bar the pleadings must necessarily be somewhat liberal and nontechnical to serve the ends of justice on account of the unusual complexity of the matters in issue. There was ample opportunity open, therefore, in the case at bar for the carriers in their bill to set out all their alleged grievances. The carriers complain of an absence of adequate discussion by the Commission of evidence and grounds relating to reductions in the grain rates. But their bill and brief are remarkably silent as to the general content or lines of evidence introduced of record in their behalf which the Commission is alleged to have failed to analyze and weigh in its report. True, they complain that the Commission refused, after a most exhaustive investigation, to reopen the case for further hearing in response to their appeals so to do, but they do not assert any lack of time or opportunity to pre-

sent their proof and contentions during the long course of the hearings. We do not mean to intimate that the record is lacking in evidence as to the financial status of the carriers and the facts regarding their revenues, but both the bill and the briefs are almost silent with respect to any allegations or contentions thereupon, and we think are lacking in essentials necessary to support the charge of an alleged failure of the Commission to cover in its reports the evidence and the grounds underlying its decision.

POINTS AND AUTHORITIES.

I.

The courts will not disturb decisions of the Interstate Commerce Commission made within its constitutional and statutory jurisdiction and authority upon substantial and competent evidence and rendered pursuant to the exercise of its administrative discretion, unless it is made clearly evident that the Commission abused its discretion or materially misinterpreted or misapplied the law in the discharge of its functions and duties.

Ann Arbor R. Co. v. Fellows, 236 Fed. 387, 390.
Baer Bro. Mercantile Co. v. Denver & Rio Grande Railroad Company, 233 U. S. 479, 486.
Chicago I. & L. R. Co. v. United States, 270 U. S. 287.
Interstate Commerce Commission v. A. M. Ry. Co., 168 U. S. 144.
Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 215.
Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452, 470.
Interstate Commerce Commission v. Union P. R. R. Co., 222 U. S. 541.
Kansas City Southern Railway Company v. United States, 231 U. S. 423, 443.
Louisville & Nashville Railroad v. Garett, 231 U. S. 298, 305.
Louisville & Nashville R. R. Co. v. United States, 245 U. S. 463, 466.
Manufacturers Ry. Co. v. United States, 246 U. S. 457, 481.
New England Division Case, 261 U. S. 184.
Pennsylvania Co. v. United States, 236 U. S. 351, 361.
Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 226.
The Minnesota Rate Cases, 230 U. S. 352, 433.
United States v. New River Co., 265 U. S. 533.
Virginian R. Co. v. United States, 272 U. S. 658.

II.

There is nothing in the sworn petition, exhibits or affidavits of the appellants or in the answers of other parties, or in the main opinion or order of the Commission, or in the separate and concurring opinions of individual commissioners, or in the aura of facts and circumstances surrounding the action of the Commission involved, or in any other part of the record before this court to support or warrant an inference that the Commission in its decision under review abused its discretion or misinterpreted, misapplied, ignored, or disregarded any of its legal powers, duties, or functions in disposing of the issues embraced in its investigation of the rate structure on grain and grain products.

SUMMARY OF ARGUMENT.

I. The courts will not set aside rate decisions of the Interstate Commerce Commission based upon sufficient evidence, unless it appears that the Commission abused its discretion, or exceeded its jurisdiction, or was misled by erroneous theories as to its legal powers and duties.

II. The record before the court affords no proof that the Commission abused its discretion, or misconceived or misapplied its legal powers, or that it disregarded any of its legal duties in reaching its decision in the case under review.

1. The mere ordering of reductions in a substantial body of the rates on grain and grain products affords no indication that the Commission failed to give due weight to the fair net return provision of section 15*a*.

2. The fair net return provision in section 15*a* does not supplant or submerge but simply supplements and enlarges the standards of reasonableness already obtaining under section 1.

3. As a matter of inherent impossibility, the forces of economics and trade cannot be withstood or their effects overcome by the Commission through the exercise of its simple legal power to fix rates, so as to produce the allotted net return to the carriers under fundamentally adverse circumstances and conditions.

4. The Commission is not a mere calculator of the net return, but is charged with employing its flexible discretion in weighing and balancing all the factors and standards of reasonableness obtaining under section 1 as well as under section 15*a*.

5. The value of the commodity, the worth of the service to the shippers, and other factors under section 1 are criteria to

be given equal weight with the fair return provision under section 15*a* in determining the reasonableness of rates.

6. The Commission did not engage, as appellants assume, in moving rates up and down within the "zone of reasonableness" under the alleged baneful influence of the Hoch-Smith resolution, but what it did do was to find certain rates unreasonable under section 1 and to prescribe reasonable rates for the future under that section on a precise and definite level.

7. The separate and concurring opinions of commissioners do not reveal the presence of any substantially erroneous legal conceptions either therein or in the main report or order.

8. Neither previous decisions on grain rates nor contemporaneous or subsequent decisions of the Commission on other matters can or do afford any basis for the contention of appellants that the mind of the Commission was clouded with legal error in making the decision under review.

9. Granting or refusing petitions for rehearing rests in the sound discretion of the Commission, and it did not abuse its discretion in denying the petitions of appellants for rehearing in the case at bar.

10. There is no basis for upholding the assertion of appellants that the Commission acted upon material data outside the record.

ARGUMENT.

There is nothing in the sworn petition, exhibits or affidavits of the appellants or in the answers of other parties, or in the main opinion or order of the Commission, or in the separate and concurring opinions of individual commissioners, or in the aura of facts and circumstances surrounding the action of the Commission involved, or in any other part of the record before this court to support or warrant an inference that the Commission in its decision under review abused its discretion or misinterpreted, misapplied, ignored, or disregarded any of its legal powers, duties, or functions in disposing of the issues embraced in its investigation of the rate structure on grain and grain products.

No serious dispute apparently exists between the parties as to the correctness of the proposition set forth in division I of our "Points and Authorities." We shall, therefore, devote ourselves for the most part to division II.

No Legal Error or Abuse of Discretion May be Imputed to the Commission from the Mere Fact that Rate Reductions Were Made When the Carriers Were Not Receiving the Assigned Net Return.

The carriers contend that the Commission in reaching its decision acted under erroneous legal conceptions of its powers and duties. The court is asked to draw the same inference. Certain facts and circumstances are brought forward by the carriers as purporting to warrant this inference. Among them is an expression in the main decision itself and especially certain remarks in the separate opinions of some of the commissioners. Appellants refer, also, to views ex-

pressed by the Commission in other decisions made prior to or about the same time as the grain case. But one cannot read the briefs of the appellants filed here and in the district court without perceiving that there is a dominant thought in the mind of the carriers upon which they base their assertion that the Commission proceeded upon unsound legal principles and theories. The persistent and repeated emphasis of this idea by the carriers shows that it overshadows all others upon which they rely. It is this: That the Commission has subjected itself to the strongest suspicion of having committed legal error by the bare fact that it reduced rates on leading articles of commerce over a wide area when the carriers were realizing less than the allotted net return. This circumstance is introduced and magnified by the appellants in such a way as to make it constitute the main atmosphere and background of their entire presentation herein. In the case at bar the prime task of this court is to examine the mind of the Commission as it operated in the grain case and to determine whether it was so aberrated or confused by legal error as to preclude its normal and lawful functioning in the decision of the matters before it. This court has expressly held that it is not concerned with the *results* of the Commission's decisions so long as it keeps within its powers and duties and proceeds upon sound legal principles (*Virginia R. Co. v. United States*, 272 U. S. 658.) Nevertheless the carriers elevate a single *result* of the present decision into supreme prominence and insist that the mind of the Commission must be presumed to be permeated with legal error by reason of the rate reductions themselves made in the absence of the net return.

In *Virginian Railway v. United States*, supra, the supreme court of the United States, on page 665, says:

"This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other procedings before it."

It follows that the mere action of the Commission in reducing some of the grain rates should not be taken as any indication whatever by which to judge the correctness or incorrectness of its conceptions as to the nature or extent of its legal duties and powers. (*New England Division Case*, 261 U. S. 184; *United States v. New River Co.*, 265 U. S. 533; *Chicago I. & L. R. Co. v. United States*, 270 U. S. 287.) Nor is this altered by the fact that the carriers were at the time, and for a decade past had been, failing to receive the net return.

"Ignoring" Section 15a.

The attention of the court is invited to some typical phrases employed by appellants in pressing their contention that the Commission rendered its decision under a misconception of its legal powers and duties.

We quote herein from the briefs of appellants filed both in the district court and the supreme court in order that the theory on which their suit was instituted and pressed below, and the extent to which such theory has been adhered to or qualified above, may be observed.

On page 40 of their brief in the district court the carriers say that the Commission may not "disregard or ignore section 15*a*." On page 12 of their reply brief in the district court the carriers affirm that "section 15*a* must be taken into consideration by the Commission" in a case of the character of the grain case. On page 13 they argue the "extent to which the Commission may disregard the requirements of section 15*a*" and the extent to which it "may disregard the net return of the carriers." On page 14 they emphasize that the Commission is "required to give consideration to section 15*a*."

Similar expressions are repeated in the brief of the carriers in the supreme court. (See, for example, pages 74 to 81.)

What do the carriers mean when they say the Commission "disregarded" or "ignored" or failed to "take into consideration" the

requirements of section 15*a*? What did this ignoring and disregarding and failure to take into consideration consist of? Do the carriers mean to intimate that in deciding the grain case section 15*a* did not enter the consciousness of the Commission? Would the carriers have this court understand that the Commission gave no serious thought to the provision in section 15*a* covering the fair net return? The report of the Commission shows and the Commission expressly declares that it did consider and weigh all sections of the act, including the fair return provision in section 15*a*. To affirm, therefore, that the Commission "disregarded" or "ignored" or failed to "take into consideration" the provision of section 15*a* is not enlightening to the court until it clearly appears what the content and implications of these phrases are as they are employed by the appellants in this case. When one reads the briefs of the carriers with this query in mind and reflects upon the central implication of these terms as applied by the carriers, it becomes perfectly clear that the heart and substance of their complaint in this respect is that the Commission "ignored," "disregarded" and "failed to take into consideration" the provision of section 15*a* because they ordered reductions on rates at a time when the carriers were not receiving and had not been receiving the allotted net return. To "regard" or "consider" section 15*a* means in the view of the carriers that the new factor of reasonableness added by that section must be given preëminence and must be made to override all those fundamental preëxisting and long-established standards of reasonableness embraced in section 1. The failure of the carriers to realize the allotted net return in the past may have weighed ever so heavily (as indeed the report clearly shows it did weigh) upon the mind of the Commission; other traffic, transportation, and economic conditions militating in favor of rate reductions upon grain and grain products may have confronted the Commission in ever so impressive array;

a record of over 2,100 exhibits and over 55,000 pages of transcript, portraying circumstances and conditions of the greatest complexity, may have indicated to the Commission ever so strongly that certain of the rates must come down; the anxiety of the Commission (as disclosed in the report) to preserve the future revenues of the carriers may have been ever so earnest and sincere. Such obstacles and forces moult no feather with the carriers. They were not realizing the net return. That was enough. The Commission had no discretion to consider anything else. It did not embrace the net return provision in section 15*a* as all-transcending and supreme, and the Commission is therefore, in the view of the carriers, to be placed by this court under the imputation that it "disregarded," "ignored," and "failed to give consideration" to section 15*a*. True, in this connection the carriers complain of certain expressions in the main opinion and in the separate opinions accompanying the Commission's order, which will receive our attention later herein, but we believe that the court will not fail to perceive in its reading of the brief of the appellants that the assertion of the carriers that the Commission ignored and disregarded section 15*a* has no real depth or substance except as founded on the simple assumption that under section 15*a* the Commission may not substantially reduce rates on a leading commodity over an extensive territory when the carriers as a group or as groups therein are failing to receive the desired and allotted net return on their property devoted to transportation use. The discretion of the Commission to consider and balance all factors of reasonableness and to give each (including the revenue factor) its appropriate weight is, in the view of the carriers, to be deemed as abrogated and destroyed. The revenue factor is not only to be supreme but in the absence of the net return is to be treated only by rate increases or the preservation of existing rates and never by rate reductions, and this despite the holding of the

supreme court that rate increases may under certain circumstances and conditions result in the diminution rather than in the enlargement of the revenues of the carriers, as expressed in *Florida v. United States*, 282 U. S. 194 at page 214, where this court said:

"The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage."

The central contention of appellant common carriers in this case is, therefore, that the Interstate Commerce Commission in its decision now under review both misconstrued and ignored paragraph 2 of section 15*a* of the interstate commerce act, reading as follows:

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country." (U. S. Code, title 49, sec. 15a; 41 Stat. L. 488.)

The argument advanced by the carriers is to the effect that under section 15*a* the Commission cannot, without subjecting itself to the reproach that its mind and acts are infected with legal error, under any circumstances or conditions reduce all or a substantial part of the rates on a commodity moving in large volume over a widespread division or area of the country, if it appears that the carriers as a group or as groups are at the time failing to earn an aggregate annual net railway operating income equal to a fair return (now fixed by the Commission as 5¾ per cent) upon the value of the rail-

way property held for and used in the service of transportation. The carriers estimate that the reductions in the grain rates prescribed by the Commission will result in a decrease of about $20,000,000 annually in their revenues. Elsewhere herein we point out that in the year 1924, instanced by the carriers, the gross revenue on all traffic of the carriers in the territory involved was approximately $1,271,000,000, and their total revenues dervied from all operations, including other than freight service, were $2,231,208,135. Twenty million dollars is less than 1 per cent of $2,231,208,135. The carriers in effect say, therefore, that the legal duty of the Commission under section 15*a* to bring about the allotted fair return to the carriers is so absolute, inflexible, and supreme over other considerations, that if, under the multitudinous circumstances and conditions revealed in a record consisting of over 2,100 exhibits and over 55,000 pages of transcript, it shall prescribe rate reductions on any commodity which the *carriers calculate* may reduce their total annual revenues by less than 1 per cent, the Commission may be brought into court and from this fact alone be placed under the imputation that it has misconstrued its legal powers and both affirmatively and negatively violated the law in the performance of its functions.

True, the appellants in their briefs work up gradually to this bold proposition. They first dwell upon certain alleged legal errors and misconceptions said by them to be present and evident in the composite mind of the Commission as a whole and in the individual minds of some of the commissioners separately. They stress the alleged vitiating influences which they conceive the Hoch-Smith resolution to have had upon the Commission collectively and upon its members individually. These are, however, only preliminaries to their main contention, which they emphasize in their briefs filed both in this court and the lower court. On page 40 of their brief in the district court, the carriers say:

"If, despite the requirements of section 15*a* and at a time when the carriers are receiving far less than the rate of return contemplated thereby, the Commission may reduce by from 10 to 13 per cent all of the rates on grain and grain products from which 12.1 per cent of the aggregate revenues are derived, it may by the same token make similar reductions in the rates on all other major descriptions of traffic and thus not only prevent the carriers from ever receiving the fair rate of return contemplated by the statute but materially reduce revenues already altogether inadequate thereunder."

The same contention in varied language is found throughout the brief of the carriers in the supreme court.

The foregoing language leaves no doubt as to the meaning of the carriers when they say that the Commission "ignored" section 15*a*. The essence of their complaint is that the Commission made widespread reductions in the rates on the important traffic of grain and grain products at a time when the carriers were not realizing the allotted net return. The reductions themselves under such circumstances constitute, in the view of the carriers, proof that the Commission "disregarded" and "ignored" section 15*a*. True, the carriers dwell upon alleged errors of the Commission in interpreting and applying the Hoch-Smith resolution. They magnify certain language and expressions employed by individual commissioners in their separate and concurring opinions, which the carriers affirm to be indicative of the presence of unsound legal views and conceptions. But these arguments, after all, serve only as background and atmosphere for the main thesis of the appellants in this case, namely, that the Commission is shown to have erred by reason of the simple fact that it did reduce a substantial body of rates when the railroads were not receiving the contemplated net return. The Commission in its report expressly affirms that it did give due consideration to section 15*a*. The carriers in their search for error center upon the *result* of the order. The *result*, they say, was to

reduce rates extensively when the net return was not being realized. Let the main thesis of the carriers be, therefore, stripped down to its essence, and let it be clearly apprehended that what the appellants contend is that section 15*a* forbids the Commission to order substantial rate decreases on any commodity moving in large volume over an extensive area if the allotted net return is not being realized, for if, from the fact of such reductions being made, the inference may be drawn that the Commission is neglecting or violating its legal powers and duties, then the effect is to forbid it under any circumstances so to reduce rates where the allotted return has not been forthcoming.

The Alleged Transcendency of Section 15a, as Portrayed by the Carriers.

As a part of their main thesis the appellant carriers also contend that section 15*a* overtops all other sections of the interstate commerce act. Again we refer to briefs of appellants filed both below and here in order that the whole tenor of their presentation may be observed. On page 40 of the brief in the district court they affirm that section 15*a*—

"is the keynote of the whole scheme of rate regulation embodied in the interstate commerce act as it now reads."

On page 16 of the same brief we read:

"This section (15*a*) is the corner stone of the existing system of regulation as created by congress."

On page 28 of their brief in the supreme court we observe the carriers saying that section 15*a*—

"qualifies *and controls* the powers, which may be exercised under sections 1 and 15." (Italics ours.)

On page 90 of the same brief appellants affirm:

"The reasonableness of the rates imposed is to be determined *primarily* by a consideration of the relation between the resulting net revenue and the value of the property." (Italics ours.)

On page 25 of their brief in the district court appellants say:

"It appears from the face of the report that the carriers' rate of return during the period considered by the Commission was far below the standard prescribed by section 15*a* to govern the action of the Commission in the exercise of its regulatory power."

The words "to govern the action of the Commission" clearly reveal the view of the appellants that the provision of section 15*a* in question is not to be regarded as simply introducing a new factor and an additional criterion of reasonableness, but it is to rise supreme over and to supersede all other factors, criteria, and standards prevailing before its enactment, for "to govern" is to rule, to dominate, to control, and to brook the interplay and effects of no other mollifying or mediating elements or considerations.

Section 15*a*, relating to the fair return upon the value of the property of the carriers, was enacted in the transportation act effective February 28, 1920. In their bill and briefs the carriers point out that from such date to the present the carriers as a whole have never earned the return of 5¾ per cent fixed by the Commission on the value of their property, and in this connection they quote from page 627 of the report of the Commission (164 I. C. C. 619, Rec. 77) in the grain decision now under review as follows:

"*Financial Condition of Carriers in the Western District.* The percentage rates of return of Class I carriers in the Western District, by regions, for the calendar years 1921-'28 were as follows:

	REGIONS			
	Northwestern.	Central western.	Southwestern.	Western District.
1921	1.42	4.45	3.17	3.12
1922	2.78	4.07	3.27	3.45
1923	3.45	4.50	3.65	3.96
1924	3.12	4.21	4.34	3.87
1925	3.60	4.41	4.37	4.13
1926	3.83	4.86	4.56	4.45
1927	3.40	4.28	3.98	3.92
1928	4.04	4.59	4.32	4.35

"The above percentages are computed on the investment of the carriers, as shown by their books, including materials and supplies and cash as of the beginning of the year."

The Theory of the Carriers as a Repudiation of the Commission's Work in the Last Decade.

From the foregoing it will be noted that the carriers as a whole or by groups have not secured the allotted return in any year since 1920 up to and including 1928 either in the country as a whole or in any of the four principal regions or districts. The record herein establishes the same fact to be true up to the time of the hearing, in May, 1931, of this case in the district court. Under the interpretation of section 15*a*, as promulgated by the carriers herein, they say in effect that the Interstate Commerce Commission since 1920 has been open to the imputation of being constantly derelict in its duty to prescribe rates for the country as a whole and for each of the principal regions or districts thereof in conformity with the provisions of that section. In *Increased Rates, 1920,* 58 I. C. C. 220, the Commission ordered, effective August 26, 1920, advances in general freight rates ranging in the several regions from 25 to 40 per cent, the said increases being made, however, with respect to certain commodities by the use of specific advances in cents per hundred or per ton. These increases did not bring about the allotted return. The theory of the carriers herein places the Commission under the charge that it failed in such case to perform its legal duty under section 15*a*. Effective July 1, 1922, the Commission ordered a 10 per cent reduction in freight rates applicable generally throughout the United States, as embodied in *Reduced Rates, 1922,* 68 I. C. C. 676. The theory of the carriers herein would severely impugn the action of the Commission in making a widespread reduction of rates on July 1, 1922, in the face of their failure since 1920 to realize the allotted return. In its decision of October 20, 1921, in *Rates on Grain, Grain Products and Hay,* 64 I. C. C. 85, the Commission gave special treatment to grain, grain products and hay several months in advance of the general 10 per cent reduction of July 1, 1922, already mentioned, and over a widespread

area in the Western and Mountain-Pacific groups prescribed substantial decreases applicable on these particular commodities at a time when the carriers were not earning the allotted return on the value of their property. In the case at bar the appellant carriers affirm that the soundness of the Commission's conceptions of its legal powers and duties is open to question and suspicion, if under section 15*a* it orders substantial reductions over a large area or region on a basic commodity moving in extensive volume where the carriers are not securing the assigned percentage of return on the value of their property. Under the theory advanced herein by the carriers the Commission therefore again violated its legal duty in its decision in the hay and grain case of October 20, 1921, above referred to.

In the decade intervening since the passage of section 15*a*, in 1920, the Commission has ordered in other instances substantial reductions in rates for widespread territorial application.

The appellants assert in effect that one of the most important and powerful of governmental institutions has for a decade been misconceiving and misapplying a major section of the interstate commerce act, in that the Commission has failed to follow a theory of interpretation of that section of the statute which the appellant carriers are now solemnly bringing forward in their efforts to set aside and nullify the order of the Commission under review herein. If indeed the Commission has for all these years been under an erroneous conception and has been repeatedly making the egregious legal blunders imputed to it by the carriers herein, it of course falls within the duty and province of this court to arrest this tendency and action of the Commission and, to direct its feet into the true paths of procedure and conduct. But this appellee respectfully suggests that a theory of the carriers involving such implications and entailing such consequences, and now prominently put forth for the

first time, should receive from this court the closest analysis and severest scrutiny.

Earnings of Important Grain Carrying Lines in Excess of 5.75 Per Cent.

It should be noticed in passing, however, that not all the individual grain carriers were failing to realize the net return.

The Commission shows in its report (p. 627, R. 77) that the percentage rates of return of Class I carriers in the Western District, as a group, for the calendar years 1921 to 1928 range from 3.12 per cent in 1921 to 4.45 per cent in 1926, and in no year amounted to 5.75 per cent, the figure fixed by the Commission in *Reduced Rates, 1922*, pursuant to section 15*a*, as the fair rate of return under the provisions of that section. The percentages referred to, as stated, are for the Western District carriers *as a group*. In other words, they are average figures, from which it follows that some of the appellant carriers must have earned less and others earned more than the averages. To what extent certain carriers may have, in certain years, earned in excess of the 5.75 per cent rate does not appear. Such carriers, however, are here asking relief from the Commission's order as well as those carriers whose earnings are less than the average reported.

In the record before the Commission certain carriers, appellants herein, were shown to be earning at the time rates of return in excess of 5.75 per cent (Answer of the Public Service Commission of Kansas, herein, R. 588). Some of the more important grain-carrying lines are as follows: A. T. & S. F. Ry., 6.88 per cent; Union Pacific Railroad, 8.91 per cent; Great Northern Ry. 6.28 per cent; Missouri Pacific Ry. 5.81 per cent; G. C. & S. F. Ry., 8.11 per cent; P. & S. F. Ry., 16.45 per cent; Ft. W. & D. C. Ry., 17.61 per cent. These earnings are those reported for the year ended December 31, 1926.

The valuation of the properties upon which the calculations are made would no doubt meet with objections from the carriers, but making reasonable allowances, it is fair to say that the record shows that some carriers in some years must have earned in excess of the 5.75 per cent return. As for the matter of value, it should also be observed that the values of these properties are still in course of investigation, and no definite finding is even yet available.

Prior to the enactment of section 15*a* the principle had become well established by decision that a carrier which has devoted its property to public use is entitled to demand no return in excess of a fair return upon the reasonable value of the property devoted to the public convenience. (*Smyth* v. *Ames*, 169, U. S. 466; *Covington & Lexington Turnpike* v. *Sanford*, 164 U. S. 578; *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19.)

Some of the appellants, therefore, are in the position of complaining of a rate order involving reductions in rates notwithstanding their apparent earnings in excess of a fair return. Whatever may be the construction of section 15*a*, it is doubtful that an individual carrier could complain of an order reducing its rates on the ground that all carriers in the group or district in which its lines run are not earning upon the average the fair return contemplated by section 15*a*.

Fettering the Commission With a Single and Supreme Fiat.

The thesis of appellant carriers to the effect that the Commission lays itself open to the accusation of acting in disregard of its legal duties where it orders a reduction of rates over an extensive area on a commodity moving in large volume at a time when the carriers as a group or as groups are failing to secure the specified percentage return on the value of their property, would, if given effect by this court, result in a most serious restriction and curtailment of the

Commission in the exercise of its functions as an administrative and quasi-judicial tribunal. Its freedom of action would be shackled by a fixed and single rule of action and the flexibility of its discretion and powers would be solidly frozen. The consideration of bringing about the allotted return to the carriers would be elevated into ascendancy over all other elements, conditions and circumstances. Adverse economic and trade conditions of country-wide and world-wide extent might be operating with irresistible force to depress the value of the commodities transported by the carriers; the percentage relationship of the level of freight rates to the diminishing value of these articles of commerce might be ever so high and ever so constantly ascending; what the traffic would bear in the assessment of freight rates might be ever so diminishing—and yet under the theory advanced by the carriers herein the Commission would be bound in the midst of a changed and ever-changing economic status of the world to maintain the previous level of freight rates on all basic commodities originating in large volume over widespread territories and seeking movement over the lines of the carriers of this country to consumptive markets and trade outlets. In their briefs the carriers attempt to minimize the effects of these plain inferences from the contention advanced by them by saying that in the grain decision under review herein the Commission "disregarded" or "ignored" section 15*a*, which they say is the keynote of the whole scheme of rate regulation embodied in the interstate commerce act as it now reads. They affirm that the Commission did not give due consideration or due weight to the provisions of section 15*a* as they relate to the allotted return. But when the contentions of the carriers are scrutinized in the effort to perceive the grounds upon which they charge the Commission with "disregarding" or "ignoring" section 15*a*, the chief burden of their complaint is that the Commission is shown so to have disregarded and ignored it by the bare fact that

it ordered certain reductions in a large body of the rates on grain and grain products in an extensive territory at a time when the carriers were not realizing and for a long period had not been realizing the allotted net return on the value of their property devoted to transportation use. The revenues of the carriers can come only from the traffic. Rates do not constitute revenues. Without the movement of traffic in adequate volume, rates of whatever level cannot in themselves supply the carriers with the desired revenues and the allotted net return on their property. And yet despite the all-controlling effect of this fundamental condition, the carriers appear before this court and assert that the power of the Interstate Commerce Commission under present conditions and under those which have obtained for a decade is limited to the ordering of reductions in individual rates here and there for particular hauls of minor and limited scope by reason of a provision in a single section of statute which they would make to override all other sections and all other provisions of a statute enacted, amended, supplemented and developed by congress in the light and under the experience of dealing with the transportation problems of this country for a period of over forty years. In the past the Commission has been invested with the discretionary power to advance or reduce rates as all the existing or shifting circumstances and conditions might require. Under present conditions and as they have existed for the last ten years the carriers would by an interpretation of their own of section 15*a* take away from the Commission one of these two major functions. Under existing circumstances as to the net return they would permit it to advance, but not reduce, rates in a substantial manner. Despite the play of the forces of inflation and deflation and of action and reaction in this country and the world, the Commission would be commanded under the thesis of the carriers to look at only one side of the picture and to disregard all the deflationary

and reactionary elements in the situation to the end that the carriers might have a level of freight rates theoretically high enough to yield the desired return provided a sufficient volume of traffic should move.

Giving Section 15a Its Due Proportionate Weight.

In our view the carriers in their interpretation of section 15*a* have failed to keep things in proper proportion and have not taken into due account the various important purposes and objects of the interstate commerce act as disclosed by a survey of the growth and development of this far-reaching statute. In the original enactment of this statute two great objects, among others, were evident. One was the prevention of the assessment and collection of unreasonable rates and the other was the elimination of unjust discrimination and undue preference as between persons, companies, firms, corporations, localities and particular descriptions of traffic. These two great objects persist in full force to-day in the statute as amended and supplemented. We frankly acknowledge the important supplemental effect of the amendment embodied in section 15*a*. But the true conception of section 15*a* is that it supplements but does not supplant the basic provisions relating to reasonableness and unjust discrimination in rates contained in sections 1 and 3. Section 1 forbids unreasonable rates, but sets up no definite standards or criteria for determining same. The Interstate Commerce Commission and the courts have given content to this section over a long period of administration and interpretation of the act. We believe that section 15*a* was intended to have a modifying influence and effect on these standards and criteria of reasonableness. In our view, however, section 15*a* operates not to submerge existing standards of reasonableness under section 1, but only to modify and to a degree to liberalize same for the benefit of the revenues of the car-

riers and to promote and maintain an adequate national system of transportation.

It will therefore be our purpose in this our brief to discuss some of the preëxisting standards of reasonableness under section 1 and to attempt to indicate the principle underlying section 15*a* as it operates to supplement, modify or liberalize the criteria of reasonableness obtaining prior to the enactment of this amendment under section 1 of the act. Such a treatment of the subject will in our view clearly indicate to the court that the interpretation of section 15*a* advanced by the carriers herein would, if adopted by this court, tend to destroy the essential provisions of section 1 relating to the reasonableness of rates; that such interpretation does not represent a well-balanced conclusion, which can only be arrived at by a proper blending of sections 1 and 15*a* with each other, but arises from the effort to construe section 15*a* as if it stood alone as a separate enactment instead of being properly regarded as a modifying and supplementing factor to be taken into the equation with the other fundamental enactments of the statute; and that such interpretation of the carriers of section 15*a* would, if accepted, call upon the Interstate Commerce Commission to overcome natural economic conditions and forces which it is beyond its inherent power to surmount in the effort to assist the carriers in realizing the ideal of the allotted return on their property embraced in the physical system of transportation as it exists to-day throughout the United States.

Section 15a as It Confronts the Inherent Weaknesses in the National Transportation System.

The carriers affirm that section 15*a* transcends all other sections of the interstate commerce act and that in carrying out the provisions of section 15*a* relating to the allotted return the Commission must subordinate all other parts of the act. In their brief in the

district court they say, as we have already noted, that section 15a "is the keynote of the whole scheme of rate regulation embodied in the interstate commerce act as it now reads." This leads us to reflect upon some of the governing facts and conditions and of the real and inescapable financial and economic problems which confront the Commission in the administration of section 15a in order that the soundness of the carriers' contention in this respect may be put to the test. The present railroad system of the United States is the result of long growth and development. The railroads were not built by the government, but represent the ambitious enterprises and financial hopes of many men and groups of men. Some of these railroads or railroad systems have been soundly conceived as transportation enterprises and have been successful. Their lines have been strategically located so as to enjoy a lucrative and constantly growing traffic. The expenditures for original construction, extension and expansion have been warranted by contemporaneous or future possibilities in available volume and profitableness of traffic. These railroads have been built, developed and maintained in harmony with natural and all-powerful economic forces and conditions and their success is ascribable to the inherent soundness and excellence and to the wise and foreseeing management of these transportation enterprises. There are other transportation enterprises resulting from the laying out and construction of railroads which have lacked these natural and inherent elements of success. It is self-evident that under the great diversity of conditions obtaining in the immense expanse of our country some railroad enterprises must be far less successful than others. Great differences in various parts of the country in the density of population and of traffic, in topography and expense of construction and maintenance, in the nature and value of commodities to be transported, in the cost of labor and materials, and in the judgment, wisdom and foresight of

the promoters, builders and developers of our transportation lines and systems, must inevitably result in a network of transportation partly excellent, partly mediocre, and partly inherently weak and lacking in essential capacity and adaptability for financially successful operation.

This court has itself taken cognizance of the inherent weakness of parts of our national transportation system. In *New England Divisions Case*, 261 U. S. 184, it remarks on page 191:

"It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak lines . . . weak roads were to be helped by recapture from prosperous competitors of surplus revenues. . . . The weak were to be helped by preventing needed revenue from passing to prosperous connections."

The government of the United States has not endowed the railroads. It has not appropriated the money to make a weak railroad strong. There is, of course, the recapture provision of the act, but congress has not in its enactments provided that a lame railroad or railroad system shall receive grants of money from the national treasury to build up those financial resources and reserves which it is inherently impossible for it to derive from the revenues obtainable from an insufficient volume or an inadequate density or an inferior quality of the traffic which in view of its geographical location may under efficient management flow over its rails. Freight rates have no magical power to overcome inherent deficiencies in our weak railroads or railroad systems.

Section 15a Versus Economic Law.

In dealing with the level of the freight rates the Interstate Commerce Commission is subject to the operation of resistless natural forces and conditions. The Commission cannot determine how much acreage of corn, wheat, oats, barley and other grains the farmer may

think it prudent to plant. This acreage devoted to grain is an elastic, variable and ever-shifting element dependent upon world supply and demand, and on the judgment, discretion and even upon the speculative whims and caprices of the farmers of this country. For this reason the Commission has no power to create the volume or determine the extent or the direction of movement of grain and its products or to dictate the amount of revenues derivable therefrom in defiance of uncontrolled and uncontrollable economic forces. The Commission has no power to determine the number of live stock to be bred or fattened or the extent, direction or distance of their transportation to the markets. The Commission is in the same helpless position with respect to the volume and extent of movement of other than agricultural products. It has no power to command the United States Steel Corporation or the Bethlehem Steel Corporation or the Youngstown Sheet and Tube Company to produce and ship a full and normal volume of their products in order that the railroads under the level of rates prescribed by it may receive a net return equivalent to 5¾ per cent annually upon the value of the property devoted to transportation use. The cotton growers in the South and Southwest and the lumber industry in the North, Northwest and South do not receive or obey orders from the Interstate Commerce Commission as to the tonnage which they are each year to produce and transport to the end that the railroads under prescribed rates may have the desirable volume of revenue. Congress has invested the Commission with not an ounce of power to bring articles of commerce into existence and to compel the movement of same at prescribed rates over the lines of the carriers. And yet in the case at bar the carriers condemn the Commission for reducing some of the grain rates (while increasing others) in a period of business depression and at a time of a great falling away from

the normal volume of general traffic on the mere theory that section 15*a* commands the Commission to maintain, in the midst of all obstacles and under all circumstances and conditions, a net return of 5¾ per cent annually on the value of their property. They would bind the Commission hand and foot like Lazarus in his grave clothes and have this court lay down an arbitrary edict that the Commission is forbidden under section 15*a* to reduce the rates on any commodity moving in large volume over an extensive area of this country if at the same time the carriers are not realizing the allotted return. Under the thesis of the carriers the Commission is not to be permitted to consider whether the level of the freight rates may have an effect on the volume of traffic transported. It is required to disregard an experience in rate regulation during which it has repeatedly found that rates may not reasonably be higher than the traffic will bear. The Commission must ignore its numerous holdings that the value of the commodity is a factor in determining the reasonable level of rates to be levied upon it. According to the view expressed herein by appellants, section 15*a* supplants all these old-fashioned standards and criteria and the Commission must devote itself simply and solely to the one idea of compelling the flow of the desirable quantity of revenue to the carriers, and it must accomplish this result with its narrow legal power to prescribe the level of freight rates even in the midst of a wracked world and a stagnant commerce.

We suggest that a true interpretation of section 15*a* can hardly be arrived at without a proper reflection upon these all-powerful forces and conditions to which we have referred. It is our view that it was the intent of Congress that the Commission should give to section 15*a* a reasonable and sensible administration and that it should not be expected to undertake the achievement of the im-

possible. The very first phrase of the paragraph of section 15*a* in question recognizes the supplementary character of the new enactment and its dependence upon the fundamental provisions of the act as they had in substance existed for over forty years, for we read in the beginning sentence that "in the exercise of its power to prescribe just and reasonable rates" the Commission shall undertake the administration of the matters embraced in section 15*a*. We cheerfully admit and indeed affirm that the new enactment had a modifying effect on the standards of reasonableness which had grown up under section 1. For this reason we have touched upon some of those standards in order that the meaning of section 15*a* and the modifying effects thereof may be more clearly understood.

The Commission as a Mathematical Calculator of the Net Return.

We suggest again that no sound interpretation of section 15*a* can be reached until full consideration is given to the all-powerful natural conditions and forces with which the Commission must deal in administering this provision of the statute. The attempt of section 15*a* is to provide a prescribed net percentage return for the carriers on a rather definite value of property devoted to transportation use. In this effort the Commission is compelled, however, to deal with basic and ruling conditions and forces which are inevitably operating and which are at times exceedingly unstable and variable. By direction of law the Commission has for a long period of years been making a valuation of the property of the carriers, and for practical purposes the results are now somewhat complete. While the value of the railway property changes from time to time by reason of depreciation and depletion, additions and betterments, the building of new lines or the extension or abandonment of old ones, and so forth, it may nevertheless be truthfully said that the value of the railway property devoted to transporta-

tion use is now a rather definitely ascertained factor in the situation. The Commission has set 5¾ per cent as the allotted return upon the property. If the task of the Commission in administering section 15*a* consisted simply of computing percentagely the net return in relation to the value of the property, the discharge of the undertaking imposed upon it by the law would be simple and easy. An ordinary mathematician could readily perform all its functions in this respect. But when the Commission is called upon to adjust the freight rates on an immense number of commodities over large territorial expanses in such a way as to bring about a fixed net return on a definite valuation of property, it is in the nature of things compelled to deal with mighty and all-powerful economic forces and conditions requiring the exercise of the highest type of administrative wisdom and discretion. In the midst of such difficulties mathematical computations would be the most futile and useless of things.

The Worth of the Service as a Limitation on Freight Rates.

A fundamental factor in the fixing of rates is the value of the transportation service to the shippers. This has ever been, and must in the nature of things ever continue to be in the future, a basic element. There is a large number of the major commodities which must be successfully moved in extensive volume. There is an almost unlimited number of minor commodities of infinite variety in kind and value. An extensive experience in the past regulation of rates has fully demonstrated that the nature, value and extent of movement of each commodity must be carefully considered in determining the level of the rates to be applied thereto. The value to the shipper of the transportation service with respect to a given commodity is of controlling importance. Sand cannot be sold and shipped upon a level of freight rates properly applicable to coal. Under resistless economic forces and conditions, sand cannot stand

a level of rates under which coal may move with ease and in full volume. The value of the transportation service with respect to sand is not *worth* the level of the rates on coal. In the last analysis, the money payable for transportation must come out of and be supplied by the commodity transported. Coal cannot inherently pay the level of rates properly applicable upon wheat. Coal does not have an unlimited value to the domestic or industrial consumer. It cannot be made permanently to yield freight revenues which are out of due proportion to the value of the commodity. The worth of the transportation service to the shipper is determined to a considerable extent by the value of the commodity transported. This value and the consequent worth of the transportation service vary markedly at different times and in different periods. The resistless forces of economic law bring about these variations in commodity values. The contention of the carriers herein is that the Commission may not revise the freight rates downward on a basic commodity over a large territorial area in the presence of a downward trend over a period of years in the value of that commodity, if a mathematical computation indicates that the carriers as a whole or in groups are not realizing the specified percentage return on a fixed and substantially invariable value of the railway property devoted to transportation uses. During a period of over forty years of regulation the Commission has held the worth of the transportation service to be a fundamental criterion in the prescription of reasonable rates. It has assumed that the level of the freight rates must inevitably be related to the value of the commodity. It has not, of course, made the value of the commodity or the worth of the service the sole tests of reasonableness. Other factors have been considered. But the Commission has gone on the principle that it is not possible, lawful or just to extract from a commodity freight rates which are in excess of the value of the transportation

service performed upon such commodity. In the case at bar the carriers in effect assert that the old standards of reasonableness under section 1 were swept away, that a new paramount criterion governing the level of rates was introduced through the enactment of section 15a, and that to-day the consideration that the carriers secure the allotted return transcends all others and nullifies and destroys all previous tests respecting the justness and reasonableness of rates. Hitherto the determination of the reasonableness of rates has elicited from the Commission an administrative discretion in which numerous factors, forces and conditions were weighed together in reaching a well-balanced conclusion as to the lawful and proper level of freight rates on a single article or on numerous commodities. This in the view of the carriers is now all to be done away with. The alloted return on their property is to be the supreme consideration. The Commission is not to consider whether the level of rates demanded by them on grain and grain products will in actual operation tend to diminish the volume produced and shipped. In an era of declining prices it is to disregard the diminished worth of the transportation service. The rich content of tests, standards and criteria of reasonableness evolved in past decades in administering the interstate commerce act is to be cast out of the mind of the Commission. Its powers to order general rate reductions in the absence of the net return are to be deemed as abridged. Its chief function is to assume the rôle of a mathematical computer of the percentage relationship of the net return to the value of the railway property. Where, as during the last decade, the carriers have not earned the allotted return, its simplified duty with respect to general rate revisions is to consist in generally elevating the levels of freight rates on the principal commodities over wide territories in the simple faith that nothing else is required either to promote justice or to produce

adequate revenues. The grain growers may restrict their acreage of planting or retire in variable degrees from their enterprise of grain production. The competitive grain and grain products of Canada, the Argentine, Russia, France, Australia and China may supplant the grain of the United States in the markets of the world by reason in part of the burden of the freight rates. Of all this the Commission is to take no notice. It is to shut its eyes to the resistless downward trend of commodity values throughout the world and to proceed in the sublime faith that rates and rates alone will bring forth adequate and ample revenues for the carriers. If this be the import of section 15*a* it is time that Congress and the people of the United States understood it and that they be brought to realize that their aspirations for the maintenance of the revenues of the carriers and an adequate transportation system have been embodied in a provision of the interstate commerce act based on the pursuit of economic folly.

No Magic in Section 15a.

Obviously, therefore, the maintenance of an adequate system of transportation in the United States is an enterprise the success of which is dependent on the observance of the controlling laws of economics and trade. A suitable provision in an act of congress, when properly interpreted, will undoubtedly contribute materially to the accomplishment of the result desired. But there is no sorcery in a mere legal fiat which will transform the transportation system of the carriers into a successful business enterprise in violation of the just and reasonable rights of the shippers and in antagonism to the overwhelming force of the laws of economics and trade. In regulating the freight rates the Interstate Commerce Commission is charged with the fitting of its activities into this general enterprise of transportation. Its powers are not miraculous. It cannot simply

smite the rock with high freight rates and cause abundant railroad revenues to gush forth. Nor is the ability of the carriers to realize the allotted return upon the value of their property a foregone conclusion. Though it is a consummation devoutly to be wished, it can be achieved, if at all, only by a course in harmony with the transcendent forces of the economic law and legal justice. Section 15a cannot reasonably be construed to command the Commission to accomplish an arbitrary result which it is impossible to achieve under the trend of the times and in the face of forces and conditions which no law can nullify or divert from their full operation and effect.

We submit, therefore, that it was not the purpose of section 15a to supplant or destroy the great principles and standards of rate regulation which had previously grown up in the interpretation of section 1 and other parts of the interstate commerce act during a long period of regulation. This is not to say that section 15a did not importantly modify and supplement the statute as it previously stood. Its effect, however, is evolutionary rather than revolutionary. It sought to inspire a deeper attention on the part of the Commission to the revenue needs of the carriers. Without eliminating previous standards relating to the reasonableness of rates, it added or gave new emphasis to another factor of reasonableness, namely, the revenue needs of the carriers as related to the maintenance of an adequate system of transportation. To give this new factor a devastating supremacy would be to defeat the very end of section 15a, for obviously a successful system of transportation in the United States cannot as a matter of inherent possibility be based on freight rates which transcend the value of the service to the shipper or which by their excess suppress and diminsh the volume of traffic, or which disregard the effects of other forms of carrier competion, or which run counter to the basic laws of economics and trade. That section

15*a* lays a new affirmative duty on the Commission we do not deny. But in our view the duty of the Commission under section 15*a* with respect to the net return is an obligation, not to elevate that factor into a sweeping supremacy, but to weigh it with other preëxisting standards and criteria developed in a long history of administration of the interstate commerce act by the Commission and the courts.

Business Hazards Surrounding the National System of Transportation.

In the effort properly to interpret section 15*a*, we suggest that it should be fully realized that transportation by common carriers in the United States is still a business enterprise. It is still encompassed with many, if not almost all, of the risks and vicissitudes of a business venture. To be sure, the transportation system is impressed with a public use, which fact distinguishes it sharply from a private undertaking. But the federal government has up to the present time made no enactments which eliminate, in any thorough and effective manner, those basic hazards which attend the operation of business enterprises in general. The provision in section 15*a* designed to secure the desired revenues for the carriers and to promote the maintenance of an adequate system of transportation represents, therefore, in the nature of things, an aspiration and effort to bring about the ends desired, but it does not and cannot nullify the operation of those natural forces and conditions which determine the success or failure of other business ventures. This is not to intimate that the Commission is not charged with solemn affirmative duties in its administration of section 15*a*, nor is it to say that this enactment has no effective power to accomplish the objects desired; but it is to realize that in the simple weapon of the freight rates the Commission has been invested with no adequate strength whereby it is inherently possible for it to overcome many of those

all-powerful forces and vicissitudes which surround and control other lines of business enterprise. We trust the court will permit us to clarify our statement by an illustration which refers to certain current conditions of common knowledge. Let us hypothetically assume the percentage relationship of the present values of various commodities to the peak values of 1929 to be as follows: Goods at wholesale, 70 per cent of the 1929 peak; wheat and corn, 38 per cent; oats, 43 per cent; cotton, 32 per cent; wool, 62 per cent; cattle, 59 per cent; hogs, 44 per cent; lambs, 34 per cent; lumber, 68 per cent; and copper, 32 per cent. We mention these figures not in the effort to inject evidence into this discussion, but simply for illustration; but we are entitled to the presumption that the extensive record before the Commission in the grain case contains ample similar evidence so far as the same may have a bearing on the issues in that proceeding. Is it reasonable to suppose that the transportation enterprise of the common carriers in the United States can escape the effects of world-wide economic and trade conditions such as those noted? Is it reasonable to imagine that the Commission has under such circumstances the inherent power through the simple device of freight rates alone to bring into actual existence a fixed percentage return to the carriers on a definite valuation of their property covering a period of twenty years? Is it fair to the Commission to attribute to it a disregard and violation of its legal functions under section 15*a* in the presence of such insurmountable forces and conditions as our illustration portrays? The carriers, as we have said, insist that the provision in section 15*a* relating to the fair return is the keystone in the arch of rate regulation as the interstate commerce act is now constituted. It is in their view to be deemed as outstripping all other considerations. How can this be reasonably asserted in the light of our illustration? Section 1 of the act has hitherto embraced the value of the commodity

and the worth of the transportation service as basic criteria of reasonableness. May it be fairly urged against the Commission that it "failed to consider section 15*a*" when it reduced the rates on grain and grain products under a record of 2,100 exhibits and 55,000 pages of transcript which this court will presume revealed in all fullness the pertinent circumstances, facts, conditions and forces of the kind and character which are visualized in our illustration?

The Words "As Nearly as May Be" and Their Deeper Significance.

The provision of section 15*a* under discussion directs the Commission to prescribe rates which will enable the carriers to earn a net railway operating income equal, "as nearly as may be," to a fair return. On page 105 of their brief in this court the carriers indicate their belief that the words "as nearly as may be" simply recognize that the rate of return contemplated could not be achieved "with mathematical accuracy." We suggest that these words have a much deeper significance. They recognize the existence and inevitable operation in connection with the transportation enterprise of those all-controlling and inescapable economic forces, conditions and hazards which we have sought to portray. We think that the considerations mentioned have an important bearing on the true interpretation of the provision in section 15*a* relating to the fair return. We suggest that congress intended no more than to add an additional factor or standard of reasonableness to those already obtaining under section 1. The weight and effectiveness of this new factor must inherently depend to a degree on other basic and resistless circumstances, conditions and forces. This new factor cannot reasonably be held to have supplanted or subordinated the criteria of the value of the commodity, the worth of the service, the risks

in transit undergone by the carriers, the natural limitation of what the traffic will bear and other standards under section 1 of the act, for these standards represent no artificial or arbitrary theories of rate-making but simply give heed to the primary demand of justice and reflect the all-powerful forces and conditions of trade and commerce which we have noted. Section 15*a* relative to a fair return embodies, therefore, not an artificial legal fiat or an arbitrary command to the Commission to perform the impossible. It is not a repeal of the Commission's discretion in its administrative task of prescribing the rates. Nor is it a colorless and meaningless enactment. The conscience of the Commission is charged with the duty of seriously including this new factor and giving it all the weight which can reasonably be assigned to it under the facts and circumstances presented. It cannot be doubted that this new factor has in the past resulted and in the future will result in the actual lifting of the general level of freight rates. It is as if in the presence of existing forces, a new and modifying force is introduced, producing a changed and different resultant in level and direction. The old forces are not withdrawn or disregarded. Their effect is merely modified by the operation of a new pressure.

On page 74 of their brief in the supreme court, appellants say:

"In the district court, counsel for the Commission, however, as well as counsel for all other appellees, took the position that it was not the duty of the Commission to give any consideration to section 15*a* in this case."

On the same page of the same brief the carriers say:

"The argument below was that the commission is not required to give any consideration to the requirements of section 15*a* in any case, of whatever scope, and however direct a bearing the action taken may have upon the rate of return of *all* of the carriers in one or more of the rate-making groups established by the Commission under section 15*a*, save only in a proceeding in which all of the rates of such carriers are under review at one time."

This appellee has taken no such position either here or in the district court. We have consistently said, and here reaffirm, that it is the duty of the Commission in all rate cases, large or small, to give all due consideration to the net-return provision of section 15*a* as one of the important factors of reasonableness. We say simply that it is not the only factor. We affirm further that the record before this court clearly indicates that the Commission did accord all due proportionate weight to the net-return provision in its decision relative to the rates on grain and grain products.

The "Zone of Reasonableness" and the Issues Herein.

We quote again the statement on page 40 of the brief of the carriers in the district court as follows:

"If, despite the requirements of section 15*a* and at a time when the carriers are receiving far less than the rate of return contemplated thereby, the Commission may reduce by from 10 to 13 per cent all of the rates on grain and grain products from which 12.1 per cent of the aggregate revenues are derived, it may by the same token make similar reductions in the rates on all other major descriptions of traffic and thus not only prevent the carriers from ever receiving the fair rate of return contemplated by the statute but materially reduce revenues already altogether inadequate thereunder."

The foregoing is a flat and unqualified statement that the Commission may not lawfully reduce a substantial body of rates on a heavy-moving commodity in the absence of the assigned net return of the carriers. The appellants apparently became fearful upon further reflection, as to the entire soundness and validity of their contention, for later they appear to qualify the proposition announced. On page 86 of their main brief in the district court the carriers say:

"Assuming that the Commission is empowered by the interstate commerce act to reduce rates already within the zone of reasonableness to a lower point in such zone, it is not empowered so to do

when the carrier's rate of return is less than that required by section 15*a*, and in doing so the Commission both exceeded its powers under section 1 and disregarded the positive duty imposed upon it by section 15*a*."

On page 88 of the same brief the carriers add:

"It appears on the face of the report that the carriers' rate of return was far below that contemplated by section 15*a*. Whatever, therefore, may be power of the Commission when the carriers' revenues exceed those contemplated by section 15*a*, to move rates about within the zone from the highest possible to the lowest possible rate, it clearly may not exercise such power consistent with the duty imposed by section 15*a* when the carriers' revenues are far below the standard created thereby. Assuming the existence of the power asserted, section 15*a* constitutes a clear limitation upon the exercise of such power under the circumstances described."

Language to the same effect will be found on pages 30, 31 and elsewhere throughout the brief of appellants in the supreme court.

As shown by the quotations above, the carriers affirm that when they are not realizing the allotted return the Commission may not reduce rates on a major commodity over extensive territory if those rates are already within the "zone of reasonableness." The "zone of reasonableness" is a phrase much used in the rate field during recent years. What underlies this expression? We hear much of the upper limit and the lower limit of this zone of reasonableness. Some rates are said to fall just under the top, others just over the bottom, and still others would appear to be stationed more or less vaguely somewhere in other strata of this zone. The Commission is pictured to us as trudging about and anchoring rates or bodies of rates at various heights and depths between the roof and the floor of the "zone of reasonableness." When the Commission has established a rate or set of rates under all the facts, circumstances and conditions revealed by the evidence in a case before it, we are told in effect that the result arrived at is not to be considered as representing anything definite in the way of a just and

reasonable level, but it is merely presumed to fall somewhere (nobody can say where) between the upper and nether extremities of the "zone of reasonableness."

We do not deny that there is an elasticity and flexibility in the exercise of the functions of rate regulation. Both this court and the Commission have recognized and stressed them. There can be no objection to the phrase, "the zone of reasonableness," provided its content and meaning be properly understood. This court has occasionally employed it in its proper sense. (*American Express Co. v. South Dakota*, 244 U. S. 624.) But it is a striking and an arresting phrase and one well calculated to pass into current use and to become perverted from its appropriate significance in the process. In performing its administrative duties the Commission is undoubtedly permitted the freedom of a "zone of reasonableness" in the exercise of its administrative discretion. An infinite mind assigned to the task of regulating rates might need no such latitude of discretion. It could fully perceive and grasp the complex and almost endless facts, circumstances and conditions involved in an intricate rate case and arrive at a correct result with such accuracy and precision as to attain the perfections of an ideal justice. Not so, of course, with the human members of the Interstate Commerce Commission. To them must be granted a latitude of discretion in dealing with matters of such scope, diversity and complexity as are involved in a proceeding such as this, embracing the rates and practices relative to grain and grain products. But the zone of reasonableness attaches to the exercise of the Commission's discretion and not to the result arrived at. When that discretion has once operated in harmony with the guiding hand of the law, as interpreted by this court, it must be presumed that the prescribed rates are the precise and definite fruits of administrative justice. They stand, until changed, as the only and exact just and reasonable rates. If is so

everywhere in the law. A jury has a discretion in finding the facts and formulating its verdict. But when it has validly acted under legal instructions received by the court the decision reached is not deemed simply to fall somewhere within the "zone" of justice. In contemplation of law it represents precise, definite and inflexible justice. A federal judge may be given a latitude of discretion in fixing the term of imprisonment of a felon, but when the court has acted and set the time of service for the prisoner the result is not in law to be regarded simply as being somewhere in the "zone" of justice. A chancellor in disposing of an intricate and involved matter in equity is given a wide zone of discretion in passing upon the veracity and reliability of the testimony of witnesses, in determining the primary and ultimate facts involved, and in dealing with the multiplicities which often characterize proceedings in that branch of the law. But when the discretion of the chancellor in all its latitude and flexibility has once been exercised the forthcoming decree is not in law assumed to be merely something falling somewhere within the "zone" of equitable relief. It is to be regarded as an embodiment of precise and definite justice as administered by that department of our jurisprudence. We suggest that the rates prescribed by an administrative tribunal are not to be differently regarded. In reaching its conclusions the Commission has a wide administrative discretion in the zone of reasonableness, but there can be no good logic in looking upon such a zone of reasonableness as existing with respect to and enveloping the resulting rates themselves. Section 1 of the interstate commerce act requires the maintenance of just and reasonable rates and not rates within a *zone* of justness and reasonableness.

We believe, therefore, that the "zone" idea as advanced by the carriers will not be helpful to the court in disposing of this case. In the main brief of the carriers in the district court this idea was

touched upon but lightly, but in their reply brief and in their brief here it is given much prominence. If the nature of the zone theory has, as we have sought herein to show, been misconceived by the carriers, obviously the arguments of the carriers based thereupon need be given no serious attention by this court. The carriers assert that where the rates lie within the zone of reasonableness the Commission may not, in the absence of the allotted return, reduce them so as to lower their level within the zone. But the argument is simply unintelligible if their notions of the zone theory are, as we think, untenable. If the zone of reasonableness is in the exercise of the Commission's discretion and not in the resulting rates the carriers are merely saying that where rates are reasonable the Commission may not reduce them if the carriers are at the same time failing to receive the allotted return. This is to say nothing significant at all, for if rates are reasonable the Commission could not legally, and presumably would not, reduce them in any event, whether the carriers are earning the return or not.

The "zone" argument of the carriers is without point, for in investigating the rates on grain and grain products the function of the Commission was to prescribe just and reasonable rates under the composite standards and criteria of both sections 1 and 15*a*. It was not concerned with, nor did it indulge in, the elusive pastime of moving rates up and down within the "zone of reasonableness." It was charged with employing and did employ its flexible administrative discretion in determining a single and definite level of reasonableness and in finding rates above such level to be unjust, unreasonable and unlawful. There is no point to the "zone" argument of the carriers for the further reason that the Commission did in fact find the grain rates, dwelt upon by the carriers, to be excessive, unjust and unreasonable and prescribed proper, just and reasonable rates. True, the carriers insist that the Commission abused this

discretion and exercised it while under the cloud of legal error, but this affirmation is in no way supported, and no enlightenment is given to the court as to any sound basis for making it, by the lengthy discussion and exposition by the carriers in their briefs of a false conception and a wrong application of the concept of the "zone of reasonableness." Their entire contention in this respect remains based simply on the assumption that the Commission condemned and reduced rates which were at the time lawful, just and reasonable.

Section 15a Not Construed by the Commission as a "Mere Permission."

The carriers seize upon the language used in the report in connection with section 15*a* as alleged evidence of a misconstruction by the Commission of that section. The statement referred to is as follows:

"The question here presented is . . . also whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by law, including section 15*a* of the interstate commerce act, which we construe to permit, but not to guarantee, the carriers to earn 5.75 per cent on the fair value of the property devoted to the transportation service." (p. 627 of the Commission's report, R. 77.)

A fair view of the language used by the Commission is that the intention was to say that the effect of section 15*a* was not to require the Commission in all events and without regard to other things to maintain the rates of the carriers upon such a plane as would produce the 5.75 per cent return, but that the fair return is only one of the many factors which enter into the question of the reasonableness of rates and which the Commission is bound to weigh and consider.

The Commission does not say that it need not consider the provisions of section 15*a* and give full force and effect to them. On the contrary, the language is:

"The answer *must take into account* . . . section 15*a* of the interstate commerce act, which we construe . . ."

Obviously, the intention is to say that section 15*a* must be taken into account and weighed as one important factor, but that it is not to be given preëminence to the exclusion of other basic factors, certainly not to the extent of requiring the maintenance of unreasonable and otherwise unlawful rates for the purpose of producing the average 5.75 per cent return. This reasonable interpretation of the Commission's language comports with the view of section 15*a* which has been taken and continuously maintained by the Commission since the enactment of the section in 1920.

The interpretation placed upon section 15*a* by the Commission, properly understood, is not to nullify the section. On the other hand, the Commission has shown continuing evidence since the enactment of the section of a due regard for its provisions and a full sense of its responsibility thereunder. The carriers here are merely endeavoring to take advantage of a form of words and infer a meaning which the language does not justify and is positively negatived by many other expressions and actions of the Commission, later discussed in this brief.

The Commission's Alleged Indefinite Standard.

It is contended by the carriers that the Commission substituted for the positive standard of section 15*a* an indefinite standard of its own. Stress is laid upon the sentence appearing on page 698 of the Commission's report, as follows:

"We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation,"

and it is contended that the expression "the maintenance of an adequate system of transportation" is lifted bodily from the Hoch-Smith resolution and that similar language appears in the Commission's report in *California Growers' & Shippers' Protective*

League v. S. P. Company, 129 I. C. C. 55, the order in which was set aside in *Ann Arbor R. Co. v. United States*, 281 U. S. 658. From all of which the carriers infer that the Commission was proceeding under the erroneous construction of the Hoch-Smith resolution entertained by it prior to the decision in the Ann Arbor case instead of under the interstate commerce act.

The contentions of the carriers regarding the Hoch-Smith resolution are encountered elsewhere in their brief. They are apparently introduced to persuade the court that the Commission has ignored section 15*a* and has done so upon the theory that the Hoch-Smith resolution had modified the provisions of section 15*a*. To make their point they rely again upon the use by the Commission of certain language: "the maintenance of an adequate system of transportation," as found on page 698 of the Commission's report. But the use of this expression by no means indicates that the Commission was giving an erroneous construction to section 15*a*. On the contrary it could be taken as evidence that the Commission was influenced by section 15*a* rather than by the resolution, for we find the expression in the section itself and in decisions antedating the resolution.

In the third paragraph of section 15*a* the following sentence occurs:

"In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation."

Thus it appears that in the transportation act, 1920, congress used the expression "adequate transportation." In *New England Divisions*, 66 I. C. C. 196, decided January 30, 1922, the Commission said at page 199:

"Yet all are parts of the national transportation system and must be adequately maintained . . ."

And in *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, we find:

"The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and take other important steps to *maintain an adequate railway service* . . ." (Italics supplied.)

And the words "maintaining an adequate national railway system" are also found (p. 585).

Subsequently, in the Hoch-Smith resolution, approved January 30, 1925, congress used the expression referred to by the carriers, "the maintenance of an adequate system of transportation," and it was evidently but a restatement of the same thought in slightly different language. The idea in all these several similar expressions is the same, and the fact that the Commission in these proceedings hit upon the precise form of words used in the Hoch-Smith resolution cannot be taken to mean that it was being guided by that resolution, the idea itself obviously antedating the resolution.

Duty of the Commission to Consider Section 15a.

It is contended by the carriers that it is the duty of the Commission to consider section 15*a* in a case like this, which pertains to the rates on a single description of traffic only. It will scarcely be contended otherwise since the plain words of the statute are that—

"In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole . . . will, under honest, efficient and economical management . . ., earn an aggregate annual net railway operating income . . ."

The question is, as we see it, not whether the Commission is bound to consider section 15*a*, but rather what weight should be given to the section.

The effect of the carriers' argument is that it must be given such predominant effect that, if the earnings of the carriers on the average are substantially less than the 5.75 per cent return, and the Commission prescribes reasonable rates on a substantial body of traffic which result in reductions of the carriers' revenue, the hands of the Commission are completely tied, and it may not require such reductions to be made. We say, on the other hand, that the provisions of this section must be considered by the Commission in every instance where it undertakes to exercise its power to prescribe just and reasonable rates and, therefore, in this case, as in others; but that this is but one of the many factors which enter into the question of the reasonableness of rates, and the weight to be given it, as with the other factors, is for the Commission to determine, and its determination is conclusive.

The report of the Commission states that in determining the prescribed rates it took into account with other factors the provisions of section 15*a* (p. 627, R. 77), and that "the action here taken represents the fullest possible response to all the mandates of the law affecting, among other things, the important subjects of levels . . . and the maintenance of an adequate system of transportation" (p. 697, R. 147); the latter plainly referring to section 15*a*. The carriers contend that, regardless of these affirmations, the Commission in fact ignored and disregarded section 15*a* because of an erroneous construction of the law. The evidence relied upon to prove that the Commission acted upon such erroneous interpretation is exceedingly flimsy, as has just been pointed out, and falls short of denying the positive statements of the Commission. It must be taken, therefore, that the Commission did consider and give sufficient weight to the section.

The Commission's Conceptions of Section 15a as Indicated by Its Decision on the Recent General Rate Increase Application.

It would appear that the carriers themselves have of late begun to realize the futility of attempting to run counter to economic forces and commercial conditions in applying section 15*a*, for in the Commission's very recent decision (October 16, 1931) in the *Fifteen Per Cent Case, 1931, Ex Parte*, No. 103, 178 I. C. C. 539, we find it making, on page 557, the following observation:

"The carriers are not seeking the full fair return on value to which they assert that they are entitled by law. They are willing to share with other industries the burden of the general depression. They ask to be relieved of a part of their present burden on the grounds that public regulation prohibits them from sharing to the same extent as private industries in the profits of prosperity, that their present low earnings imperil their credit and hence the stability of an industry on which all others are dependent, and that the increase desired will restore confidence, stimulate buying, and lead the way to a return of prosperity. They further assert that on any conceivable basis of valuation they are falling so far short in their earnings as to make it unnecessary to determine in this proceeding the actual aggregate value of their properties devoted to carrier use. For similar reasons they deem it unnecessary to inquire whether the 5.75 per cent, heretofore fixed by us, is a fair return under present conditions."

In the same decision the Commission with some fullness sets forth its interpretation of section 15*a* and its own conception of its legal duties and powers thereunder. In so doing it reviews and seeks to convey its understanding of decisions of this court relating to the same subject. We quote from pages 560 to 566 of the opinion in the *Fifteen Per Cent Case, 1931*, supra:

"Before indicating the nature of the opposition, it will be well to consider the contentions of the carriers with respect to the law. Technically, the application is under section 6 of the interstate commerce act for authority to depart from our ordinary rules governing tariff publication, coupled with a request that we now reach the con-

clusion, after investigation, that if the contemplated tariffs are filed they will not be suspended. Fundamentally, however, the carriers rely upon the provisions of section 15*a* (2), reading as follows:

"'(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or reasonable, and to prescribe different rates for different sections of the country.'

"Section 1 (5), which antedates section 15*a* but was reënacted in the 1920 legislation, requires, among other things, all charges made for any service rendered in the transportation of property to be just and reasonable, and it prohibits and declares unlawful 'every unjust and unreasonable charge for such service or any part thereof.'

"Briefly stated, it is the position of the carriers that section 15*a* changes our duty to prescribe just and reasonable rates by introducing in the law a new standard for our guidance. It is asserted that under the former law a carrier in a competitive group had no legal protection unless the strongest carrier in the group was in a position successfully to assert confiscation of its property. The rates being competitive, the weaker line had to meet them or go out of business. The stronger line might not be disposed to assert in the courts its constitutional rights. Even if it were so disposed and succeeded in the assertion, the increase it could secure in the rates would only be that which would bring its own earnings above the line of confiscation of its own property. Such a measure of relief would fall below, perhaps much below, the measure of the constitutional rights of the weaker lines. Prior to 1920, the argument is that we had dealt with revenue considerations as a factor in just and reasonable rates, but had not solved the problem of the treatment of groups of railroads in such a way as to maintain their earnings, their credit and their adequacy as component parts of a national system of transportation. Section 15*a* was designed to remedy that failure. 'In substance,' according to the carriers, 'the constitutional right of a single carrier to a fair return which could

not as a practical matter be asserted, was extended to the group as a whole and the Commission was given a mandate to render the right productive.'

"Because of the provisions of section 15*a*, it is contended that rates, otherwise reasonable, perforce become unreasonably low if the general schedule of rates, of which they are a part, produces revenues which in the aggregate fail to attain the results contemplated by the section. Quoting from the carriers' brief, 'It is thus apparent that in any case involving the reasonableness of an increase or decrease in the general rate level, the revenue consideration is paramount and controlling.' Quoting again, it is said 'that the use of the expression "just and reasonable rates" in section 15*a* connotes a different meaning from its use elsewhere and recognizes the paramount financial consideration.' It is urged that the section is superimposed upon the power to prescribe just and reasonable rates in such a way that if the effect of the exercise of that power is to bring the revenues above or below the statutory level, adjustments of earnings to that level must be made by us through other changes in rates. The words 'as nearly as may be' in paragraph (2), according to this view, introduce no discretionary factor, but merely cover the mathematical impossibility of attaining the prescribed standard precisely.

"In support of this view the carriers rely chiefly upon *Dayton-Goose Creek Ry. v. U. S.*, 263 U. S. 456. Among the statements in that opinion which are stressed are the following:

"'The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is . . . by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged. (p. 478.)

"'Rates which as a body enable all the railroads necessary to do the business of a rate territory or section, to enjoy not more than a fair net operating income on the aggregate value of their properties therein economically and efficiently operated, are reasonable from the standpoint of the individual shipper in that section. (p. 480.)

"'It is clearly unsound to say that the net operating profit accruing from a whole rate structure is not relevant evidence in de-

termining whether the sum of the rates is fair. The investment is made on the faith of a profit, the profit accrues from the balance left after deducting expenses from the product of the rates, and the assumption is that the operation is economical and the expenditures are reasonably necessary. If the profit is fair, the sum of the rates is so. If the profit is excessive, the sum of the rates is so. One obvious way to make the sum of the rates reasonable so far as the carrier is concerned is to reduce its profit to what is fair.' (p. 483.)

"Among pertinent quotations from other decisions of the supreme court is the following from *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U. S. 563, 585:

"'It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in section 15*a* to be one of the purposes of the bill.'

"The carriers also stress a report of the house committee when the transportation act, 1920, came out from the conference committee. In this report it was stated that the house bill 'continued the existing law authorizing the Interstate Commerce Commission to prescribe just and reasonable rates,' but that the senate amendment 'added to the just and reasonable rate a requirement that the rates must be adequate to enable the carriers as a whole to earn a fair return on the aggregate value of their property.' It was further stated that the 'house receded from its disagreement to these provisions.'

"Up to a certain point we do not differ with the carriers' interpretation of the law. We agree that our duty with respect to fixing just and reasonable rates was changed by congress in the act of 1920, through the provision of a modified standard for our guidance. We agree that there was then introduced into the law a new element of protection for the carriers in the public interest, a protection particularly of the credit essential to the preservation of an adequate national system of transportation. We believe that it is our duty under the congressional mandate to exercise our powers

in every reasonable and practicable way to the promotion of that end. We agree, as we did in 1920, that in such a general rate proceeding as this, involving primarily revenue considerations, we cannot undertake to consider the justness and reasonableness of individual rates.

"But there is more than this to be said, if our full duty is to be made clear. In *Reduced Rates 1922*, 68 I. C. C. 676, 730, we said, in considering section 15*a*, 'Our function under the law is not that of mere computers and cannot thus be atrophied.' Assuming that the paramount purpose of that section is the provision of adequate revenue for the carriers, it is the *actual revenue result* of a proposed increase in rates which we must have in mind, and not the effect apparent superficially. We understand that in principle the carriers do not dispute this proposition, although they may differ as to how conslusions upon this point are to be reached. Our own is that we are not justified in approving a rate increase if we are convinced that such increase will not operate to the revenue advantage of the carriers.

"On this point, the following from *Florida v. United States*, 282 U. S. 194, 214-215, is pertinent:

"'In considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carriers' revenue, the question is that of the relation of the rates to income. The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage. . . .

"'The Commission made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carriers' interstate revenue and to maintain an adequate transportation service.'

"Nor is this all. In *Smyth v. Ames*, 169 U. S. 466, 547, the court said:

"'What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.'

"This principle has repeatedly been affirmed by the supreme court. It is stated in Corpus Juris, vol. 10, page 418, and we think accurately:

" 'The public is entitled to demand that no more shall be exacted from it than the services rendered are reasonably worth, and this right takes precedence even over the right of the carrier to a fair return on its investment when the two rights cannot stand together. In consequence, the value of the service to the public is an important factor in determining the reasonableness of the rates charged therefor.'

"An application of the principle is found in *Covington, &c., Turnpike Co. v. Sandford*, 164 U. S. 578, 597, where the court said:

" 'It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishment of new lines of transportation should cause a diminution of the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use the property.'

"We do not understand that congress, even if it be assumed that it could lawfully have done so, attempted in section 15*a* to override or discard this basic principle of the law, or that there is anything in the decisions of the supreme court which indicates that such a result has been accomplished. In *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, supra, 586, the court said:

" 'Section 15*a* confers no power on the Commission to deal with the intrastate rates. What is done under that section is to be done by the Commission "in the exercise of its powers to prescribe just and reasonable rates," *i. e.*, powers derived from previous amendments to the interstate commerce act, . . .'

"In the *Dayton-Goose Creek Case*, the question at issue was the validity of the recapture clause, and the court was not called upon to define or consider all the factors which affect the determination of reasonable rates. It did say that an individual shipper, because of his interest in the maintenance of 'all the railroads necessary to do the business of a rate territory,' could not complain of a general level of rates higher than would have been reasonable considering the services rendered him alone. We agree with the carriers that prior to section 15*a* the revenue needs which we were bound to consider were those of individual carriers, although as a practical matter we have long considered all competing lines and not merely that

line which can handle the business cheapest in determining the reasonableness of rates. *Receivers and Shippers Asso. v. C., N. O. & T. P. Ry. Co.*, 18 I. C. C. 440. Thereafter the standard was changed by congress so that now we are bound to consider instead the revenue needs of the carriers in the aggregate or by groups, and such needs were brought into the foreground and emphasized. In every reasonable and practicable way we must recognize those needs and protect the general credit of the carriers. The direction to maintain an adequate system of transportation was reaffirmed by congress in the Hoch-Smith resolution in 1925, U. S. Code, T. 49, sec. 55.

"But section 15*a* has not, in our opinion, made revenue needs the 'paramount and controlling' factor in the determination of a reasonable general level of rates. Factors which theretofore were relevant and entitled to consideration, notwithstanding the revenue needs of individual carriers, are still relevant and entitled to consideration, notwithstanding the revenue needs of the carriers in the aggregate or by groups. Among those other factors are the following:

"1. *The value of the service to the shipper.* The relation of the general level of freight rates to the general level of commodity prices is a factor which cannot be disregarded, particularly in a time of general financial prostration. Stated in another way, it means consideration of what the traffic can reasonably be made to bear. As the supreme court recently said in *Ann Arbor R. Co. v. United States*, 281 U. S. 658, 669, in speaking of certain words in the Hoch-Smith resolution:

"'If they mean no more than that the depressed condition of the industry is to be given such consideration as may be reasonable considering the nature and cost of the transportation service and the need for maintaining an adequate transportation service, they work no change in the existing law.'

"This resolution became law subsequent to the enactment of section 15*a*.

"2. *The volume of business carried on by the carriers and its relation to what may be deemed normal.* As we said in *Reduced Rates, 1922*, supra, 680:

"'The operation of economic forces which have prevented, or which may hereafter prevent, carriers from earning a fair return under the adjustment prevailing does not constitute a bar to determination of what a fair return should be. By the qualifying words, "as nearly as may be," congress recognized that conditions

during certain periods might prevent such realization under any adjustment of rates.

" 'Section 15*a*, reasonably construed, contemplates the determination of a return which the carriers, collectively or in rate groups, may attain over a period of time under rates adjusted from time to time with that object in view. The phrase "from time to time" does not mean that we should adjust and readjust rates to meet business fluctuations.'

"It is only necessary to have in mind the incongruous results which would follow an attempt to adjust rates so that a stable rate of return would be realized, notwithstanding general business conditions and the rise and fall of traffic in consonance therewith, to realize the unreasonableness and impracticability of any such policy. In part this is recognized by the carriers in this very application.

"3. *The return realized from the freight service alone, as distinguished from other forms of service rendered by the carriers. Nor. Pac. Ry. v. North Dakota*, 236 U. S. 585, and *Norf. & West. Ry. v. West Virginia*, 236 U. S. 605. It is not our view that these cases prevent the imposition of a burden upon one form of service to compensate for an inevitable deficiency in earnings of another form of service performed by the same carrier. *Revenues in Western District*, 113 I. C. C. 3, 22-23. However, the earnings of the particular service in question are entitled to consideration in the fixing of reasonable rates.

"For the moment we express no opinion as to the weight to be given these particular factors in the present proceeding. That will be considered later. But that they are relevant and material factors which must be given consideration we are persuaded. We are here speaking of the general level of rates, as applied to all traffic, or particular forms of traffic, and not of individual rates."

We submit that the foregoing views of the Commission as to the meaning and effect of section 15*a* are as a matter of law sound in every substantial respect. There is nothing in its main opinion or the separate opinions of commissioners in the grain and grain products case, or in the facts and circumstances surrounding that decision to afford any reasonable basis for believing that the Commission employed any different principles or entertained any different conceptions as to its legal powers and duties in arriving at its conclusions, from those revealed in its opinion in the *Fifteen Per Cent Case, 1931*, supra.

The Alleged Proof that the Commission Misapplied the Hoch-Smith Resolution.

As we have already noted, appellants contend that the Commission misconstrued and misapplied the Hoch-Smith resolution, which reads as follows:

"That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.

"That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution the Commission shall give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years, to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation. In the progress of such investigation the Commission shall, from time to time, and as expeditiously as possible, make such decisions and orders as it may find to be necessary or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates. Such investigation shall be conducted with due regard to other investigations or proceedings affecting rate adjustments which may be pending before the Commission.

"In view of the existing depression in agriculture, the Commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of

agriculture affected by that depression, including live stock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service: *Provided*, That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the Commission involving rates on products of agriculture, and that such cases shall be decided in accordance with this resolution." (U. S. Code, title 49, sec. 55; 43 Stat. L. 801.)

It will be noted in the third paragraph of the resolution that it directs the Commission with respect to agricultural products to promote the freedom of movement of same "at the lowest possible lawful rates" compatible with the maintenance of adequate transportation service. In *Ann Arbor Railroad Company v. United States*, 281 U. S. 658, decided June 2, 1930, and about thirty days prior to the issuance by the Commission of its decision on grain and grain products in question, the supreme court of the United States held that the Hoch-Smith resolution as a whole and particularly the words "the lowest possible lawful rates" effected no substantial change in the standards and tests of reasonableness theretofore obtaining under sections 1 and 15*a*. Obviously the court could reach no other conclusion. If the resolution had said "the lowest possible rates," it would, we presume, have been unconstitutional, inasmuch as the Commission would then have been directed to set the rates at any level which it might fancy would promote the freedom of movement of agricultural products. The word "lawful," in the phrase "the lowest possible lawful rates," constituted a fundamental barrier to any such action by the Commission. Sections 1 and 15*a* were preëxisting and still remained. They constituted a large part, if not the main part, of the law to which the limiting word "lawful" clearly referred. The essential provision of section 1 had been in existence for about thirty-eight years at the time of the passage of the Hoch-Smith resolution. It had been extensively interpreted by the Commission and the courts, and stand-

ards and criteria of reasonableness thereunder had been fully developed and applied by the Commission and passed upon by this court. This body and content of law was expressly recognized by the use of the word "lawful" in the phrase "the lowest possible lawful rates." Prior to its decision in the grain case at bar the Commission was fully instructed and advised by this court that the Hoch-Smith resolution made no substantial changes in the pre-existing standards of reasonableness under sections 1 and 15*a*. As we more fully show elsewhere in this brief, the Commission stated in its unanimous opinion that it decided the issues in its investigation of the rates on grain and grain products solely under the provisions of the interstate commerce act, and not under the Hoch-Smith resolution. In this main opinion the Commission makes no reference to the "lowest possible lawful rates." Despite all this, the appellants have conceived and emphasized a mist of surrounding circumstances from which they endeavor to place the Commission under suspicion by this court that it ignored section 1 and especially section 15*a*, and that in the secret processes of a mind alleged to have been magnetized, permeated and obsessed by a false interpretation of the Hoch-Smith resolution, it gave that resolution and that false interpretation a preëminent sway in prescribing the reductions in the grain rates complained of.

The carriers stress the fact that the grain rates involved in the present proceeding had been previously considered by the Commission in *Kansas Public Utilities Commission v. A. T. & S. F. Railway Company*, 83 I. C. C. 105 (R. 327), and in *Rates and Charges on Grain and Grain Products*, 91 I. C. C. 105 (R. 341), and contend (1) that as the Commission in those cases found the same body of rates not unreasonable, it must have reached its determination in this case under the Hoch-Smith resolution, and (2) that a supposed analogy between the instant case and the deciduous fruit

cases again leads to the same inference. It is pointed out that the Hoch-Smith resolution was approved on January 30, 1925, a date intervening between the decisions of the Commission in the cases referred to and the decision by the Commission in this proceeding, July 1, 1930, and that the resolution was construed by the supreme court in *Ann Arbor Railway Company v. United States*, 281 U. S. 658, decided June 2, 1930.

It is hardly necessary to remind the court that rate orders of a regulating commission are not *res adjudicata*. Even if the issues were the same and the records similar, a different conclusion may be reached upon any subsequent reconsideration. But in this instance there is but little likeness between the earlier grain rate cases and the one here challenged.

The issue presented in the prior cases was the reasonableness of the rate level on grain and grain products in the Western District *as a unit;* that is to say, whether or not the facts called for a change of all the rates by increases or reductions horizontally. The instant case was far more comprehensive in the number and variety of issues and in the size and adequacy of the record. Here were involved not only the reasonableness of the rate level as a whole, but innumerable and important questions dealing with the reasonableness of levels in the various subdivisions of the Western District and involving the relations of rates under sections 1 and 3 of the interstate commerce act, as between different sections of the country, as between markets, as between ports, as between producing territories, as between milling districts, and as between carriers.

The immense record before the Commission in the instant proceeding is sufficient to negative any inference that its action as to the reasonable level of the rates would have been the same as in the prior cases but for the Hoch-Smith resolution.

Nor will an examination and comparison of the cases bear out

the supposed analogy between the grain rate cases and the decidious fruit rate cases.

The history of the deciduous fruit cases is as follows: In *California Growers' & Shippers' Protective League v. Southern Pacific Company*, 100 I. C. C. 79, the complainant alleged violation of sections 1 and 3 of the interstate commerce act. The decision of division 1 of the Commission on June 25, 1925, was that "The rates assailed, as a whole, are not unreasonable or unduly prejudicial as alleged," and the complaint was dismissed. The Hoch-Smith resolution had been approved after the filing of the complaint and before the decision by division 1, and the report shows that consideration had been given to the resolution as well as to the interstate commerce act.

Subsequently the same complainant filed a new complaint, *California Growers' & Shippers' Protective League v. Southern Pacific Company*, 129 I. C. C. 25, in which a decision was rendered by the Commission on July 20, 1927. The Commission's report in that case shows (p. 26) that this second complaint again alleged violations of sections 1 and 3 of the interstate commerce act and further that the rates were higher than "the lowest possible lawful rates compatible with the maintenance of adequate transportation service, and . . . upon an unjust and unreasonable basis with relation to other rates" in violation of the Hoch-Smith resolution, and it is stated (p. 26) that the second proceeding presented substantially the same issues as those passed upon by division 1 of the Commission in the first case. The Commission stated in its report (p. 55), "The primary issue to be determined, therefore, is whether the $1.73 rate assailed approaches the lowest limit or level of the zone of reasonableness permitted by the flexible limit of discretion reposed in us." The finding of the Commission was that the rate of $1.73 was unreasonable to the extent that it ex-

ceeded $1.60, and that such rate was "the lowest possible lawful rate compatible with the maintenance of adequate transportation service, and necessary to promote the freedom of movement by defendants of the specified products of agriculture, now affected by existing depression in agriculture." Upon the petition of the defendant carriers for reconsideration, the finding of the Commission, on further consideration, was affirmed on November 14, 1927, 132 I. C. C. 582.

The Commission's action was reviewed by the supreme court, *Ann Arbor Railway Company v. United States*, supra, decided June 2, 1930. In the court's opinion it is said (p. 665), "The original and supplemental opinions of the Commission show quite plainly that the Commission based the order entirely upon the joint resolution" and further (p. 668), "Indeed, it is apparent from the Commission's opinions that it regarded this paragraph as requiring it to condemn the existing rates as unreasonable and unlawful, although had they been considered independently of the paragraph they must have been upheld as reasonable and lawful under the applicable sections 1 (5) and 3 (1) of the existing law."

It thus appears that in the Deciduous Fruit cases there was no doubt of the attempt of the Commission to give effect to the Hoch-Smith resolution by prescribing rates which, but for the resolution, it would not have condemned as being unjust and unreasonable. The situation presented by this case is quite different.

In this case the Commission specifically denies that it was influenced by the second paragraph of the resolution. The Commission says:

"The supreme court of the United States recently interpreted the Hoch-Smith resolution as setting up no standard of reasonableness of rate level or relation other than that already provided by the Interstate commerce act, *Ann Arbor R. R. Co. v. United States*, 281 U. S. 658, decided June 2, 1930. The findings herein are under

the provisions of the interstate commerce act." (Page 661, Commission's report R. 111).

The reports of the Commission leave no doubt that the second California Growers' & Shippers' Protective League case involved the same issues as the first case excepting only for the addition of an allegation under the Hoch-Smith resolution, and that upon this additional allegation the Commission based its decision in the second case. In the grain cases, however, the issues are not the same as between this case and the earlier cases; the records are materially different; considerable time had elapsed in which there was a change in conditions; and, finally, there is an express disclaimer by the Commission of any consideration of the Hoch-Smith resolution in reaching its determinations. Moreover, the construction of the Hoch-Smith resolution was settled by the decision of the supreme court in the Ann Arbor case while the determination of the instant case was in progress, and that the Commission took notice of the opinion of the supreme court is shown by its report herein (R. 111).

The Alleged Lack of Discussion of Evidence and of Evidentiary Findings.

The appellants complain that the report of the Commission was lacking in fullness of discussion of certain matters deemed by them to be important and that the Commission did not make findings of evidentiary facts to the extent they feel was called for by its action. It is argued, inferentially at least at page 40 *et seq.* of appellants' brief that if the Commission has proceeded under the provisions of the interstate commerce act the report would have contained a much more comprehensive discussion and findings of evidentiary facts and that the absence of sufficient discussion and findings indicates that the Commission disregarded the provisions of the act and proceeded under the Hoch-Smith resolution. As appellants concede on page 50,

of their brief, the Commission is not charged by law to make specific findings. The extent to which the Commission should discuss the evidence is left to its own judgment. However desirable it may be in the opinion of appellants or others that the Commission's reports make a full disclosure of the facts proved and the Commission's reasoning thereon, there is no ground for contending that the decision is vitiated because of the lack of discussion, nor is there any warrant for the inference that the Commission acted under any erroneous view of the Hoch-Smith resolution or otherwise than in accordance with the interstate commerce act.

In point of fact, however, the Commission's decision in this grain proceeding was unusually lengthy. The report consists of 203 pages (R. 69-272). There have been but few of the Commission's decisions reported at such length. When it is recalled that the evidence consisted of 53,000 pages of testimony and 2,100 exhibits it will be understood that the Commission did not think it practicable to make specific findings of fact in the multitudinous situations involved in the proceeding, and the practical necessities of the case will excuse the Commission from attempting this task no matter how desirable it may be deemed by appellants or others. The law does not require it, and it would seem unfair to attempt to draw any inference against the Commission.

Appellants say that the report of the Commission does not contain sufficient discussion of (*a*) the relation of the grain rates to the rates on other descriptions of traffic, (*b*) the value of the services, and (*c*) the cost of the service. There is no contention that these matters were in fact not considered by the Commission, but only that there was a failure to discuss them at length. The report, indeed, is not without some discussion of these very factors. There are many other considerations entering into the questions the Commission was called upon to determine in this proceeding, some of which were

treated in the report with fullness, others briefly mentioned, and others not referred to at all. It was for the Commission itself to determine to what extent, if at all, they should be discussed.

It is further contended by appellants that the Commission's report does not contain findings "sufficient in themselves" to support the order on any other theory than that the Commission acted upon an erroneous view of the Hoch-Smith resolution. Appellants while admitting, page 49 of their brief, that the Commission is *not required* to make specific findings of fact, contend that proper practice require it to do so, then argue that the facts reported in the decision are not sufficient to support the order under the interstate commerce act. It is a sufficient answer to say that if the law does not require specific findings of fact, there is no ground for the inference sought to be drawn that because the findings in the view of appellants are inadequate, the Commission must have proceeded under the Hoch-Smith resolution.

Comparison with Previous Decisions of the Commission Involving Grain Rates.

The carriers further undertake to demonstrate that the Commission in fact proceeded under an erroneous construction of the Hoch-Smith resolution by a comparison of the action of the Commission in this case with that taken in other grain rate cases. We have already referred to a contention that the Commission in certain earlier cases had under investigation *the entire body* of rates on grain and grain products throughout the Western District and that such cases had developed that the body of rates as a whole, without considering any particular rates specifically, had not been shown to be unreasonable. The carriers also make a comparison between this and earlier decisions involving *particular sections* of the grain rate structure as distinguished from the structure as a whole.

Reference is first made to *Ogden Grain Exchange v. Arizona*

Eastern Co., 126 I. C. C. 255, 128 I. C. C. 490, and 132 I. C. C. 46, and to *Ogden Grain Exchange v. Abiline & Southern Railway Co.*, 122 I. C. C. 691 (brief p. 63), which together dealt with the rates from southern Idaho to the Pacific coast points and to points in the states of California and Arizona and from points in southern Idaho and related points in southern Utah and near-by Montana and Wyoming points to points in Colorado, both of which were decided after this proceeding before the Commission was instituted. The entire number of rates involved in the Ogden Grain Exchange cases is relatively very small as compared with all those involved in these proceedings. The relative importance of the rates before the Commission in the Ogden Grain Exchange case depends upon the amount of grain to be shipped under such rates as compared with the entire Western District, and any governmental report of grain production will disclose the relative importance of this body of rates when compared with the Western District as a whole.

But regardless of the relative importance of these rates the carriers' argument is at fault in the assumption that the rates determined by the Commission in those cases as reasonable must be considered as reasonable in any event and under any conditions. The Commission decided those cases upon the records before it, but explicitly reserved further consideration for the more adequate record in the instant case, evidently fully realizing that such consideration might result in a different determination.

It was also natural that they should reserve for future determination in connection with the general investigation here involved the question as to what extent, if at all, the rates should be modified under the Hoch-Smith resolution; but as it turns out this case was decided after the decision of the supreme court in the Ann Arbor case, and it must be presumed that the Commission reconstructed the rates prescribed in the Ogden Grain Exchange case in making

its determination in this proceeding without reference to the Hoch-Smith resolution. The fact that upon a different record and different issues the Commission in this case found that the reasonable level of rates should be somewhat less than that prescribed in the former cases cannot be taken as proof that the lower rates were made on the basis of the Hoch-Smith resolution.

Another case referred to by the carriers (brief, p. 64), as involving a specific section of the general grain rate structure previously prescribed by the Commission is *Oklahoma Millers' League v. A. & M. Ry.*, 128 I. C. C. 523, which was followed in *Rodney Milling Co. v. St. L.-S. F. Ry.*, 147 I. C. C. 569. Both cases were decided, as contended, after this proceeding was instituted, but the decisions followed substantially *Oklahoma Corporation Commission v. A. & S. Ry.*, 101 I. C. C. 116, which case was decided prior to the institution of this proceeding.

In these cases, it is true, the Commission prescribed rates as reasonable under section 1, but upon issues and record far more narrow than those in this case. The carriers ignore the differences in issues and in records, the possible changes in conditions, and the new evidence, any or all of which might justify and require the Commission to change its determination of rates as reasonable under section 1 of the act.

It should be noticed in passing that while, as the carriers contend, the order herein would reduce the wheat rates previously prescribed in the earlier cases by approximately 15 per cent, the reduction of rates or other grain is but 2.86 per cent.

The carriers also point to the prescribed reduction of so-called "proportional rates" and contend that the action of the Commission in reducing these rates theretofore approved or prescribed as reasonable or held to be subnormal can be explained only upon the theory that the Commission was acting under the Hoch-Smith resolution.

The carriers' contention with respect to these proportional rates can be explained only by their apparent failure to understand the character of such rates. The Commission has defined a proportional rate as follows: "A proportional rate means a part of or a remainder of the through rate or it means nothing at all, and in a case of this kind there must be an examination and consideration of the entire rate from point of production to ultimate destination."* *Kansas City Transportation Bureau v. A. T. & S. F. Railway Company*, 16 I. C. C. 195, 201.

Having this definition in mind, it will be understood at once that proportional rates do not constitute a measure of reasonable maximum through rates under the standards of section 1, but the through rates of which such proportional rates are components must be considered to the end that the through rates themselves respond to the proper standards. It will also be apparent that any general revision of the grain rate structure must carry with it as a matter of course a revision of the proportional rates, as otherwise the proportional rates would lose their character as parts of through rates.

The carriers further say that the order reduces the proportional rates out of the primary markets from 14 per cent to over 50 per cent. Many of the proportional rates were out of proportion to the existing body of through rates, and to return them to a proper relationship as parts of through rates necessarily required a greater reduction in such rates than in the general body of rates. These proportional rates, in many instances, as shown, alternate with the balances of through rates, and the proportional rate or the bal-

* Proportional rates are further described by the Commission in the report herein at page 633 (R. 83) as follows: "A proportional rate is a local or joint rate dependent for application upon (1) a previous transportation to the point from which the proportional rate applies; (2) a subsequent transportation from the point to which the proportional rate applies; (3) or both. It is supposed to be a part of a through rate and is usually lower than the flat rate between the same points. When dependent upon previous inbound transportation it is applicable only upon surrender of the inbound paid freight bill showing the transportation of the shipment inbound."

ance is used, whichever makes the lower. At page 639 (R. 89) of the report herein the Commission recognized this.

"It will be seen that, because of overhead through rates, less than the rate-break combinations, the proportional rates from and between the primary markets have come largely into a state of disuse."

In reducing these proportional rates, therefore, the Commission did not reduce the going rate by the percentages indicated by the carriers, but by a substantially lesser amount, probably not different, upon the whole, than the other rates were reduced.

The proportional rates from Omaha and Kansas City to Chicago are referred to, citing *Railroad Commissioners of the State of Iowa v. Director General,* 63 I. C. C. 405, as holding that the rate of 15 cents formerly in effect was made as a result of carrier competition and to be on a basis lower than would otherwise have been justified. That case was decided in the light of the conditions then prevailing, in particular a higher general level of through rates than is provided in the Commission's report and order herein. The reduced level ordered herein necessarily must contemplate a lower proportional rate as a matter of proper relationship.

The maladjustment of these proportional rates and the extent to which they had become out of line as balances of through rates were clearly recognized after the extensive evidence on the subject, and in their rectification the Commission obviously proceeded without reference to the resolution, as evidenced in its report:

"To meet the contention, already mentioned, that through rates made on the primary market combinations are necessarily unreasonable, because of the manner of their construction, the rates herein prescribed have first been determined on a reasonable basis and, when applicable through primary markets from which there are proportional rates, broken back into flat rates to the primary markets and proportional rates beyond. The new proportional rates are better proportioned to the inbound flat rates than under the

present adjustment, and they approximate, in a general way, the average transit balances beyond the first primary markets of the through rates prescribed in Appendix D. (p. 661; R. 111.)

Expressions in the Concurring Opinions.

Finally, appellants undertake to comb the separate opinions of certain Commissioners for expressions apparently tending to show that the Commission as a body was proceeding under an erroneous construction of the Hoch-Smith resolution. In this discussion the carriers lay down the proposition that in determining the basis of the Commission's action it is competent for the court to consider the concurring or dissenting opinions of individual commissioners, citing *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, and *St. Louis & O'Fallen Ry. Co. v. United States*, 279 U. S. 461. The proposition as stated is too broad to be supported by these authorities.

In both cases the court turned to dissenting opinions of individual commissioners to throw additional light upon the construction of the law relied upon by the Commission in those cases, and in both cases the dissenting opinions were of a character to define sharply the division of opinion in the Commission and to make clear beyond doubt the view of the majority. (219 U. S. 449, 450, and 279 U. S. 486.) No such situation is presented here—there is nothing in the separate opinions from which it can be inferred that the majority of the Commission were laboring under an erroneous view of the law. What the carriers here present to the court is nothing but a collection of fragmentary expressions which scarcely would support a mere suspicion, much less justify a definite conclusion.

Commissioner Eastman's Opinion.

Taking up the separate opinion of Commissioner Eastman the carriers endeavor to make it appear that his discussion of the law may be regarded as expressing the view not merely of himself but

of the Commission. Regardless of what Commissioner Eastman's views may be they cannot thus be imputed to the entire Commission as, obviously, if the Commission desired to adopt his expressions it could have incorporated them in the main report.

We deem it unnecessary to discuss Commissioner Eastman's opinion in detail, for even if the carriers have correctly understood his discussion of the resolution, which we are not prepared to admit, there is no slightest basis for holding that the Commission as a body entertained the same views.

Appellant further refers to the fact that neither in the main report nor in any of the separate opinions is there recorded any dissent from Commissioner Eastman's separate expression regarding the resolution, and they rely upon *Southern Pacific Co. v. United States*, supra, as authority for inferring that such absence of dissent implies agreement. Regardless of what Commissioner Eastman's views may be, the carriers' contention will not stand up. It is unreasonable to hold that any obligation rests upon the majority of the Commission to record in their report a meticulous dissent from expressions of individual commissioners. Such a rule would clearly be unreasonable and impracticable.

The Southern Pacific case was quite different from this. The dissent of Commissioner Harlan in that case raised a sharp issue of law from which the court was able to say definitely that the Commission had proceeded upon an erroneous construction. The force of this definite conclusion was not weakened, of course, by the fact that there was nothing in the main report to the contrary, but the court there was not obliged to fortify a conjectural or tentative conclusion by a failure of the Commission to record a dissenting view.

Remarks of Commissioner Meyer.

One of the things chiefly urged in this connection by the carriers is certain language used in the separate and concurring opinion of

Commissioner Meyer, who was directly in charge of the investigation of the rate structure on grain and grain products in question. Commissioner Meyer personally presided over the hearings and the taking of evidence for periods aggregating about thirty-six weeks.

To support their contention that the mind of the Commission in making its decision in the grain case was clouded by legal error and was under a misconception of the nature and extent of its jurisdiction and powers in the prescription of the new grain rates, the carriers have referred to an expression of Commissioner Meyer found in his concurring opinion on page 700 (R. 150) of the report reading as follows:

"The rates prescribed lie within the zone of reasonableness, but they are the lowest rates on this traffic which can be lawfully prescribed."

The carriers assert this expression to indicate that Commissioner Meyer and the Commission proceeded in the making of the decision on a wrongful interpretation of the Hoch-Smith resolution which contains the words "the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

Commissioner Meyer joined, however, in the report unanimously adopted by all the members of the Commission. We suggest it would be appropriate to note the expressions in the main report as to the legal basis upon which it is founded.

On page 627 (R. 77) the Commission says (the italics are ours):

"The question here presented is whether, under present conditions, the rates on grain and grain products throughout the Western District are *reasonable* and *just* and are properly related to each other and to the rates on other traffic."

On page 661 (R. 111) of its findings the Commission says (the italics are ours):

"We find that the present rates on wheat and coarse grains and their products are *unreasonable* and *unduly preferential* and *prejudicial* to the extent they exceed the rates prescribed in Appendix D,

to be applied in accordance with the previous discussion herein as to rate break, relation of commodities, transit, etc., and subject to the later discussion herein of general issues or specific adjustments.

"We further find that rates between points between which rates have not been prescribed, specifically or by reasonable relation, are *unreasonable* to the extent they exceed rates made on the basis of the so-called interior scales shown in Appendix D."

It will be noted that the terms *reasonable, unreasonable* and *just* are to be found in sections 1 and 15*a* of the interstate commerce act. The terms *unduly preferential and prejudicial* are to be found in section 3 of the act.

On page 661 (R. 111) the Commission further states:

"The supreme court of the United States recently interpreted the Hoch-Smith resolution as setting up no standard of reasonableness of rate level or relation other than that already provided by the interstate commerce act. *Ann Arbor Railroad Company v. United States,* 281 U. S. 658. The findings herein are under the provisions of the interstate commerce act."

The carriers contend that despite the positive avowal by the Commission that the findings in the report were made under the provisions of the interstate commerce act, and not under the Hoch-Smith resolution, the language of Commissioner Meyer in his concurring opinion above quoted nevertheless establishes not only that the rates prescribed were based on the Hoch-Smith resolution, but that they were founded on an erroneous conception of the meaning of that resolution condemned by the supreme court of the United States: namely, that the words in the resolution "the lowest possible lawful rates" were taken by the Commission in its report and order to establish a new and different standard of reasonableness than that laid down in sections 1 and 15*a* of the interstate commerce act.

When the true background and the surrounding circumstances of the Commission's investigation and report respecting the grain rates are clearly understood, we think the words of Commissioner Meyer,

"the lowest rates on this traffic which can be lawfully prescribed," indicate a conception in the mind of the Commission itself and of Mr. Meyer directly opposite in meaning from that attributed by the carriers to the expression used. A large mass of evidence was introduced in the record to show that a depression existed in agriculture. A pressure was thus exerted on the Commission to bring about a lower future level of rates on grain and grain products. This elaborate presentation made at the hearings in behalf of the farming interests, affords the key for the true interpretation of what was in the mind of Commissioner Meyer when he employed the expression "the lowest rates on this traffic which can be lawfully prescribed."

Respecting the evidence on agricultural conditions, the Commission says on page 626 (R. 76) of its report:

"Voluminous testimony concerning conditions in agriculture, especially as affecting the wheat farmer, was offered by witnesses called on behalf of both shippers and carriers. These witnesses included farmers and representatives of farm organizations in Kansas, Oklahoma, Nevada; North Dakota, South Dakota, Minnesota, Idaho, Montana, Oregon, Washington, and other states, and men engaged in governmental, banking, scholastic, and other contacts with agriculture, some of whom we invited to give their impartial views. The range of the evidence of these witnesses covered, as of the period from immediately preceding the World War down to the then present dates, (1) the general trend of production costs and prices, and the purchasing power of the dollar, as tested by socalled indexes used in governmental and other reports; (2) bank failures, decline in hand values and wheat prices, crop failures, abandonment of farms, and increases in farm and chattel mortgages in agricultural districts; and (3) general impressions of individuals concerning agricultural conditions as a whole within their personal observation. This evidence is summarized and commented on in detail in Appendix C. It is sufficient to say here that while conditions affecting the grain farmer had been improving within the few years immediately preceding the hearing herein there is still depression in the grain industry."

Here the Commission itself frankly emphasizes the testimony put into the record by the farming interests. It should be noted in pass-

ing that this evidence was not limited to the testimony of farmers and representatives of farm organizations, but also embraced men engaged in governmental, banking, scholastic, and other contacts with agriculture, some of whom were invited by the Commission to give their impartial views. Nevertheless, let it be frankly stated by us and fully realized by the court that a great volume of evidence was presented in the record by agricultural interests demanding a severe reduction in the level of the grain rates, for that very atmosphere surrounding the investigation supplies the true interpretation of what Commissioner Meyer meant when he said the rates prescribed are "the lowest rates on this traffic which can be lawfully prescribed." His remark is in truth a statement of the reason why the Commission could not grant the demands of the farming interests as these interests pressed the language of the Hoch-Smith resolution upon the attention of the Commission. Commissioner Meyer by the expression quoted from his concurring opinion was saying to the farmers and their representatives in substance the following: You are insisting on a special and lower level of rates for agriculture by virtue of language in the Hoch-Smith resolution. This request is beyond the power of the Commission to grant you. The language in the resolution has been interperted by the supreme court of the United States. Under that interpretation no new standard of reasonableness of rates was created by the Hoch-Smith resolution. The provisions in the interstate commerce act relating to the reasonableness of rates are unmodified and are supreme and binding upon us. The Commission has therefore been obliged to prescribe the new rates on the criteria of reasonableness embodied in the interestate commerce act prior to the passage of the Hoch-Smith resolution. The Commission can therefore lawfully make no lower rates for agriculture than those which must result under the provisions of the interstate commerce act. Your evidence and contentions have had

our attention, but the rates as we have made them are the lowest rates on this traffic, despite the fact it is agricultural traffic, which can be lawfully prescribed.

The frame of mind of the carriers in this case is indicated by the following, found on pages 103 and 104 of their brief in this court:

"Commissioner Meyer, whom the report shows to have been the Commissioner in immediate charge of the proceeding, said:

" 'The rates prescribed lie within the zone of reasonableness, but they are the lowest rates on this traffic which can be lawfully prescribed.' (R. 140).

Later on, answering the demand of certain interests for reduction in the export rates, the commissioner says:

". . . But even if they had produced the desired effect we would still be without power to compel the railroads to publish them unless the rates fell within the zone of reasonableness. It is my understanding that many of these rates were established on a level below that zone. Whatever the facts may be in this regard, we are establishing herein rates as low as we can lawfully prescribe. . . . (R. 153.)

"Commissioner Meyer thus twice characterized the rates prescribed as the lowest possible lawful rates."

The carriers do not quote Commissioner Meyer with accuracy. What he says in the first quotation from his separate opinion above set forth is that the prescribed rates "are the lowest rates on this traffic which can be lawfully prescribed." In the second quotation from his opinion he says "we are establishing herein rates as low as we can lawfully prescribe." But in commenting on these expressions the carriers say that Commissioner Meyer thus twice characterized the rates prescribed as "the lowest possible lawful rates." The expression employed by Commissioner Meyer was not, however, "the lowest possible lawful rates," which is the verbatim language of the Hoch-Smith resolution. He used language conveying a distinctly different idea when he in fact said that the rates prescribed "are the lowest rates on this traffic which can be lawfully

prescribed," and "we are establishing herein rates as low as we can lawfully prescribe." We do not think that the carriers intended in their brief to pervert the expressions of Commissioner Meyer. But that brief shows that the carriers have become permeated with the idea that the mind of the Commission and of Commissioner Meyer was so thoroughly infected with error respecting the true meaning of the Hoch-Smith resolution that it was unable in the face of a decision of the supreme court of the United States to purge itself of this error in the making of the decision in the grain case. It is evident that the carriers in viewing the Commission's decision were so disturbed by the anticipated reduction in their revenues that they have been unable to perceive with clarity the direct declaration and the unmistakable indications in the Commission's report that in making its decision in the grain case it gave full heed to the holding of the supreme court in *Ann Arbor Railroad Company v. The United States* expounding the correct interpretation of the language of the Hoch-Smith resolution.

The supreme court in the Ann Arbor case did not obliterate the language of the Hoch-Smith resolution, but merely interpreted it. It simply said that the language in the resolution, "the lowest possible lawful rates compatible with the maintenance of adequate transportation service," did not change the existing standards of reasonableness laid down in sections 1 and 15*a* of the interstate commerce act. Commissioner Meyer did not in fact in his separate opinion employ this verbatim language of the resolution, but assuming that his expressions were prompted by the presence of this language in the resolution, why should it be assumed that he was speaking with an erroneous conception of their true meaning as interpreted by the court? If the supreme court of the United States can as a matter of judicial interpretation consider the phrase in the resolution "the lowest possible lawful rates" and regard it as indi-

cating no new standard of reasonableness aside from those already embodied in sections 1 and 15a, why may not Commissioner Meyer and the Commission itself refer to these words in the resolution without any imputation that their minds are, despite the supreme court interpretation, afflicted with error as to their true legal meaning? The supreme court did not place a taboo on the expression in the resolution "the lowest possible lawful rates compatible with the maintenance of an adequate transportation service." The effect of its decision in the Ann Arbor case is not to assign these words as among the "unmentionables" in polite legal circles. Yet the carriers seem to think that the Commission's legal conceptions and expressions must be held to be tarnished if it so much as ventures to mention these words of the resolution in a published report.

Other Commissioners' Separate Opinions.

The carriers also refer to the separate opinions of certain other commissioners, but they need not be discussed here beyond the remark that the expressions referred to by the carriers make very clear the speculation and suspicion in which the carriers have indulged.

The language of all the opinions, taken as a whole, as it must be, provides no ground whatever for the carriers' contention.

Overemphasis of Section 15a as Engendering Legal Error.

It is a strange thing that appellants should complain that the Commission, in the grain decision here under review, gave the Hoch-Smith resolution an erroneous preëminence in reaching its conclusions, and that they should now come into this court and insist that section 15a shall be given the same sort of preëminence so as to inundate all other parts of the interstate commerce act, by urging as they do in their brief in the district court, and by reasserting here, that section 15a "is the keynote of the whole scheme of rate

regulation embodied in the interstate commerce act as it now reads" and that it is "the corner stone of the existing system of regulation as created by congress." In its decision in the Ann Arbor case the supreme court of the United States strongly condemns attempts to give predominance to one section of the act over another. It reversed the Commission in that case because it so treated the Hoch-Smith resolution. The carriers now insist that the Commission in the grain case should have repeated this sort of error by elevating into supremacy the single factor of reasonableness in section 15a relative to the net return. On page 665 of the opinion of this court in the Ann Arbor case we read:

"The original and supplemental opinions of the Commission show quite plainly that the Commission based the order entirely upon the joint resolution. It is said in the opinions that 'the joint resolution was primarily relied upon' by the complainant; that while a violation of section 3 (1) of the interstate commerce act was alleged in the complaint 'no great reliance was placed upon that allegation'; that the 'primary issue to be determined' was whether the existing rates were in accord with the resolution; that the resoluion effected a change 'in the basic law'; and that this change operated to eliminate a decision made June 25, 1925, in another proceeding between the same parties wherein the Commission found the same rates neither unreasonable nor unduly preferential and sustained them as lawful rates, 100 I. C. C. 79. True, in both the original and supplemental opinions it is said that the existing rates are unreasonable, but the opinions taken as a whole show that this means the rates were deemed unreasonable under the joint resolution when construed as the Commission construed it, and not that they were deemed unreasonable under section 1 (5) or section 3 (1) of the interstate commerce act. Throughout the opinions it is manifest that the Commission was testing the reasonableness and validity of the rates by considerations not applicable under those sections but relieved by it to have been brought into the problem by the resolution."

In the case at bar the carriers are now urging that section 15a is to be "primarily relied upon" and that the "primary issue to be de-

termined" is the matter of the net return to the carriers, while the whole tenor of this court's opinion in the Ann Arbor case is to the effect, as we have been earnestly contending herein, that the factors of reasonableness and relationship of rates embraced in all three of sections 1, 3, and 15*a* should be balanced and weighed together by the Commission in reaching its conclusion.

While we are on the subject of the decision of this court in the Ann Arbor case we should like to point out that it seems to us that this case clearly recognizes in principle the inherent lack of power on the part of the Commission through the sole medium of freight rates to mold, resist, or overcome the natural and all-powerful forces of economics and trade in the effort to attain the ideal of the allotted net return. The words which the supreme court applied to the aspirations of the framers of the Hoch-Smith resolution for bringing about the "lowest possible lawful rates" on agricultural products might well be perused, as it seems to us, in reflecting upon the true meaning of section 15*a*. On page 668 this court said:

"Considering the connection in which these words are brought into the sentence, we think they fall much short of supporting the construction adopted by the Commission. They are more in the nature of a hopeful characterization of an object deemed desirable if, and in so far as, it may be attainable, than of a rule intended to control rate making. See *United States v. New York Central R. R. Co.*, 263 U. S. 603. Of course, they should not lightly be disregarded."

In like manner the provision in section 15*a* as to the fair return "should not lightly be disregarded"; nor is there any real evidence in the case at bar that it has been. The bringing about of the net return is "an object deemed desirable if and in so far as, it may be attainable." The Commission is required to give all due and proportionate attention to the attainment of this object in conjunction with other objects of justice and fair dealing enjoined by the interstate commerce act. But the object of the fair return is not

to be elevated to unqualified supremacy, nor can it reasonably be supposed that its achievement is to be attempted in defiance of the natural laws of business and commerce.

The Commission's Denial of Petitions for Rehearing.

The carriers argue that the Commission, in denying their petitions for rehearing of these proceedings, acted either upon an erroneous conception of its powers and duties under the Hoch-Smith resolution or deliberately and willfully disregarded section 15*a*, and its action was therefore so arbitrary and unreasonable as to render its order void. While conceding that granting or denying a petition for rehearing is a matter for the discretion for the Commission, they contend that the circumstances in this instance are such that the Commission was not justified in denying the petitions.

The carriers' contention appears to be disposed of by *Virginian Ry. Co. v. United States*, 272 U. S. 367. In that case the Virginian Railway contended, among other things, that the order of the Commission should be set aside because of facts which occurred after the original order was made. In the Virginian case the proceedings before the Commission began May 15, 1922, and did not close until February, 1923. The proposed report of the examiner was served April 30, 1924, and the original report filed on March 10, 1925.

An agreement, during the pendency of the proceeding, was made to lease the Virginian to the Norfolk & Western for 999 years. In anticipation of approval by the Interstate Commerce Commission of the agreement, the Virginian and the Norfolk & Western established and published through routes and joint rates from substantially all mines on the Virginian to markets in the West.

The Virginian filed, on April 25, 1925, a petition to reopen the case and modify its order so that the routes which had been opened via the Norkfolk & Western in partial compliance with the order

should be accepted as the equivalent of full compliance and the requirements of routes and rates via the Chesapeake & Ohio should be eliminated. The petition for rehearing was denied May 11, 1925.

The Virginian contended that, in view of these facts, the order requiring transportation service also via the Chesapeake & Ohio was so unreasonable as to transcend the limits of the Commission's discretion, among other reasons because through the duplication of routes not available to mines served only by the Chesapeake & Ohio and the Norfolk & Western, respectively, it would give to mines on the Virginian an undue preference and advantage.

Mr. Justice Brandeis said: "The argument urged in this connection is appropriate for consideration by the Commission and has presumably been duly considered by it. The fact that it has not proved persuasive affords no basis for the contention that the Commission's action in making the order was arbitrary or otherwise illegal."

In the instant case it is contended by the carriers that the Commission acted arbitrarily and in violation of its duty in not granting a rehearing and reopening of the case based upon its petitions and correspondence of executives. The Commission considered those matters, but apparently the Commission within its judgment and experience was not persuaded thereby and denied the petitions. Its judgment therein was entirely based upon the record and the law, and it can afford no ground for the carriers to say that it acted arbitrarily or illegally; and after giving the carriers' application for rehearing due consideration, which the law definitely presumes it did, it cannot be said that its decision was illegal and that the Commission violated its statutory duties, as was definitely held by Mr. Justice Brandeis as above set forth.

The carriers by reference to their petitions for rehearing and the correspondence between the Commission and the presidents of the

railroads attached as exhibits to the bill of complaint have brought before the court a number of alleged facts as to changes in the financial condition of the carriers since the close of the record before the Commission. They emphasize the facts thus disclosed as tending to support their contention that the Commission's action in denying the petitions for rehearing was arbitrary. Our contention, as stated above, is that this entire matter is completely disposed of as being exclusively in the discretion of the Commission under the authority of the Virginian case and that it is immaterial whether the facts alleged are true or not. To perceive the lack of justification for the carriers' charge that the Commission's action is arbitrary, it is only necessary to take into account that in all probability the forces which have operated to change the carriers' financial condition have also operated to alter many other factors which the Commission is obliged to take into account in the determination of reasonable rates.

Matters Outside the Record.

The carriers complain that the Commission's report contains data not in the record before the Commission. Upon examination, however, there seems to be no substantial basis for the complaint. The matters referred to are discussed below:

1. Certain checks and estimates. The carriers do not contend that the basic data were not in the record. Presumably these checks and estimates are mere calculations from documentary material and, therefore, cannot be considered objectionable.

2. The carriers' rate of return for 1928. This matter was not shown to be material by the carriers, but the data appears to be properly in the record. The figure was used in the examiners' tentative report and at the oral argument without objection by the carriers.

The Shifting Contention of Appellants.

On page 82 of the brief of appellants in this court, we read:

"The effect of the order is materially to reduce the general level of the rates on a major description of traffic without any finding that the carriers' rate of return was, or in the near future would be, in excess of that contemplated by section 15*a*, but, on the contrary, at a time when such rate of return was materially below the statutory requirement, and *without any finding*, or basis for finding, that such reduction would result in increased revenues through stimulating an increased volume of traffic." (Italics ours.)

We direct the attention of the court to the progressive variation in the carriers' theory as it is revealed by a tracing through of their original and reply briefs in the district court and their brief in the supreme court. In the first portion of their main brief in the district court they flatly assert that under section 15*a* the Commission may not reduce rates on a substantial body of traffic over an extended area where the carriers are not receiving the allotted return. Later in the same brief appellants appear to modify this contention somewhat by affirming that, when the carriers are failing to receive the net return, the Commission may not reduce the rates from a higher to a lower stratum in the "zone of reasonableness." Further emphasis is given to this proposition in the reply brief in the district court. In their brief in the supreme court the carriers seem to wish still further to modify their thesis by contending that at least such rate decreases may not be lawfully ordered by the Commission *without a specific finding* that such reductions will increase the volume of the traffic on grain and grain products and the revenues of the carriers flowing therefrom. In their brief in this court they lay great emphasis on the contention that the Commission cannot lawfully prescribe "the lowest possible lawful rates," where the rates in the absence of the net return already lie within the "zone of reasonableness." This progressive abridging, shading and coloring of the orig-

inal theory of the carriers upon which their petition and initial presentation were based offer in our view strong indications of the essential unsoundness of the grounds and reasons which inspired the institution of this case.

The court will not fail, we believe, to perceive that the appellants, in asserting that the Commission reduced rates on grain and grain products which were already reasonable (as the carriers conceive and interpret the surrounding facts, circumstances and conditions), are doing nothing less than asking that their opinion be substituted for the administrative discretion of the Commission.

The decision of the district court should be affirmed.

Respectfully submitted,

CHARLES W. STEIGER,
State Capitol Building, Topeka, Kan.,
Solicitor for Appellee.

RALPH MERRIAM,
231 South La Salle street, Chicago, Ill.,
Of Counsel.

14-1978

FILE COPY

Office Supreme Court,
FILED
NOV 28 193
CHARLES ELMORE CR
CL

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1931

No. 287

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS,

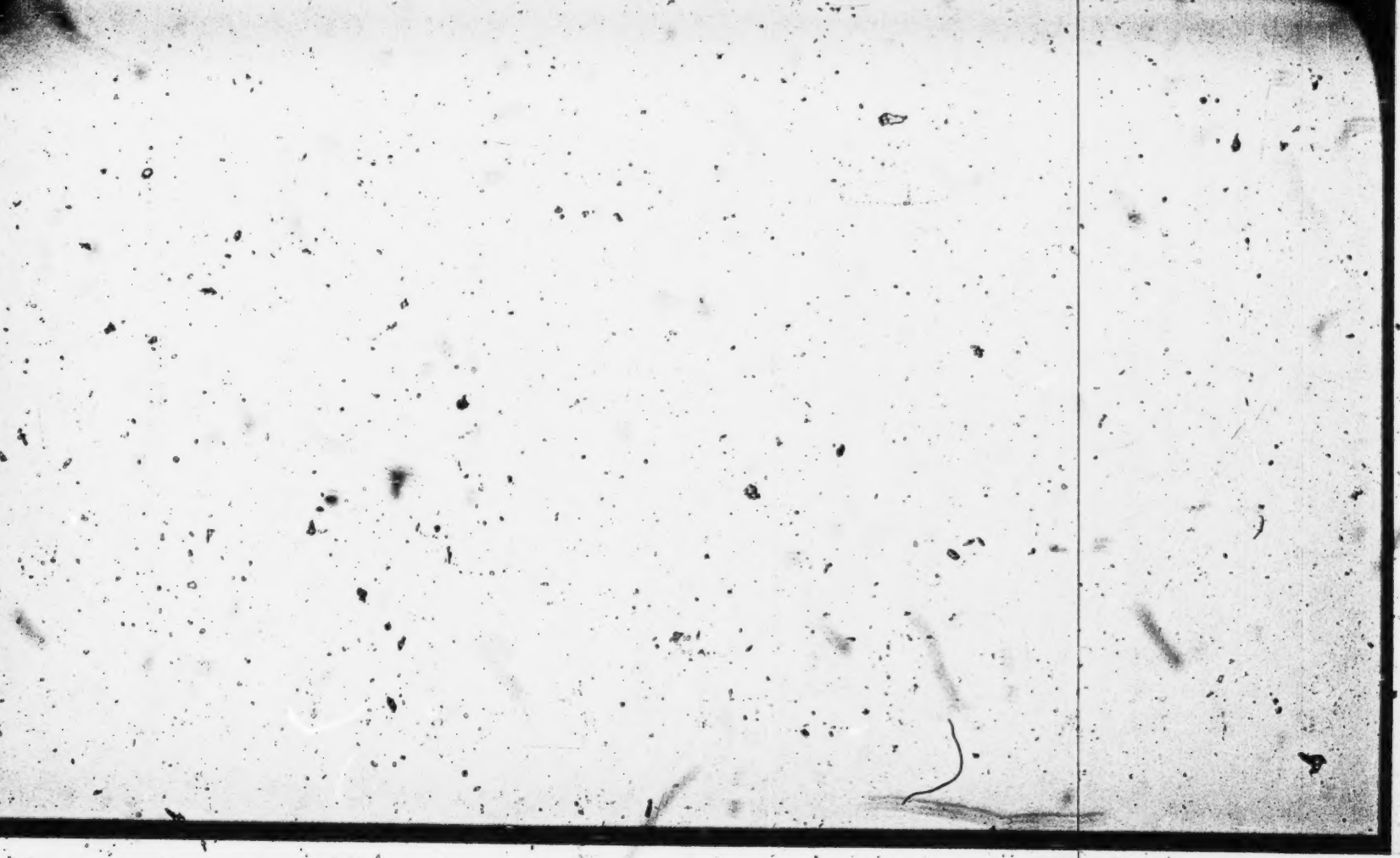
VS.

UNITED STATES OF AMERICAN, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES.

BRIEF OF NEBRASKA STATE RAILWAY COMMISSION, APPELLEE

C. A. SORENSEN, Attorney General of Nebraska,
HUGH LAMASTER, Assistant Attorney General,
Attorneys for Nebraska State Railway Commission, Appellee.
Lincoln, Nebraska,
November 21, 1931.

SIGHTER'S, Law Brief Printers, 130 North Fourteenth Street, Lincoln, Nebr.



INDEX

	Pages
Statement	1-2
Argument	2-33
I. Nature and Scope of Docket 17,000, Rate Structure Investigation	2-6
II. Propositions Meeting Appellants' Assignments of Error	6-33
a. The order of the Commission is not based upon the theory that agricultural products should receive favored treatment. The order does not give them preferential consideration and does not violate Section 15-a	6-27
b. The Commission's order is based entirely upon the record	28-29
c. The Commission considered rate increases in other parts of Docket 17,000, Rate Structure Investigation, but not rate increases in non-related proceedings	29-33

TABLE OF CASES

Ann Arbor R. Co., et al. v. United States of America, et al., 281 U. S. 658 ..... 7, 17

California Growers and Shippers Protective League v. S. P. Company, 132 I. C. C. 582 25

Dayton-Goose Creek Ry. Co. v. United States, et al., 263 U. S. 456 32

Deciduous Fruit Case, 132 I. C. C. 582 25

Interstate Commerce Commission v. Illinois, C. R. Co., 215 U. S. 452 33

TABLE OF CASES—Continued

Pages

In the Matter of Rates and Charges on Grain and Grain Products, 91 I. C. C. 105 9

Manufacturers R. Co., et al. v. United States and Interstate Commerce Commission, 246 U. S. 457 10

Meeker v. Lehigh Valley R. Co., 236 U. S. 412 25

Missouri P. R. Co. v. Norwood, 283 U. S. 249 25

New England Divisions Case, 261 U. S. 184 32

Phoenix R. Co. v. Geary, 239 U. S. 277 25

Public Utilities Commission of Kansas v. A. T. & S. F. Ry. Co., 83 I. C. C. 105 ..... 7, 9

Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Co., 257 U. S. 563 32

Rate Structure Investigation, Part 2, Western Trunk Line Class Rates, 164 I. C. C. 1 30

Virginian Railway Co. v. United States, et al., 272 U. S. 658 ..... 11, 25

STATUTES CITED

U. S. Code, Title 49, Section 13, Par. 2 2

U. S. Code, Title 49, Section 15, Par. 3 2

U. S. Code, Title 49, Section 55 2

U. S. Code, Title 49, Section 15-a 5, 6, 7, 31

U. S. Code, Title 28, Section 380 25

U. S. Code, Title 28, Section 47 25

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1931

No. 287

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS,

VS.

UNITED STATES OF AMERICAN, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES.

BRIEF OF NEBRASKA STATE RAILWAY COMMISSION, APPELLEE

C. A. SORENSEN, Attorney General of Nebraska,
HUGH LAMASTER, Assistant Attorney General,
Attorneys for Nebraska State Railway Commission, Appellee.

Lincoln, Nebraska,
November 21, 1931.

STATEMENT

The statement of appellants does not sufficiently state the supplemental order.

The supplemental order of the Interstate Commerce Commission in Rate Structure Investigation, Part VII, entered April 10, 1931, is merely mentioned in the statement of appellants. The supplemental order (R. 275-325) clarified the original order in many respects. It made reductions and increases in particular rates. Important general changes were made that increased the revenues of the carriers; such changes being a limitation of the number of transit stops, providing a charge for more than the number of free transits allowed and fixing a minimum rate of 10 cents on the prescribed interior scales authorized and in certain other cases.

ARGUMENT

I. Nature and Scope of Docket 17000, Rate Structure Investigation.

The Interstate Commerce Commission had authority under the Interstate Commerce Act, U. S. Code, Title 49, Sec. 13, par. 2, Sec. 15, par. 3, as amended, as well as under the Congressional resolution, commonly called the Hoch-Smith Resolution, U. S. Code, Title 49, Sec. 55, to institute and conduct Rate Structure Investigation, Docket 17,000. As the Commission had full power under both it would be useless to speculate as to which source of power is primarily involved in this proceeding.

The nature and scope of the Rate Structure Investigation are to be determined from the order of the Commission instituting the proceeding. The following are extracts from its order entered March 12, 1925 (R. 47-49):

> *"It is ordered,* That an investigation of the rate structure of common carriers subject to the interstate

commerce act be, and it is hereby, instituted by the Commission in order to:

"(a) Determine to what extent and in what manner, if any, rates, fares, and charges, and all classifications, regulations, and practices relating thereto, hereinafter for brevity collectively termed rates, of such common carriers for or in respect of the transportation or transmission by such carriers in interstate or foreign commerce of the various classes and kinds of commodities and the various classes of traffic, including freight, passenger, mail, and express, or any other, similar or dissimilar, may be unjust, unreasonable, unjustly discriminatory, unduly preferential, or otherwise in violation of any provision of law, including the joint resolution aforesaid.

"(b) Determine to what extent and in what manner, if any, the rates, as above defined, of such common carriers cause undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.

"(c) Make, in accordance with law, such changes, adjustments, and redistribution of rates, as above defined, as may be found necessary to correct any defects so found to exist, and to determine to what extent, if any, and upon what classes and kinds of commodities or classes of traffic, if any, compensating increases or other changes in rates, as above defined, may and shall lawfully be required or authorized by the commission in order to offset or partially offset such reductions or other changes in rates, as above defined, on other classes or kinds of commodities or classes of traffic, giving due regard, among other factors, to—

"(1) The conditions which prevail in the several industries of the country, in so far as it is legally possible to do so, to the end that commodities may freely move;

"(2) The general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years;

"(3) A natural and proper development of the country as a whole;

"(4) The maintenance of an adequate system of transportation;

"(5) Any other requirement of law laid upon the commission in respect of the initiation, modification, establishment, or adjustment of rates, as above defined.

"(d) Make in the progress of the investigation such decisions and orders as the commission may find necessary or appropriate upon the record then made in order to place the rates upon designated classes or kinds of commodities or classes of traffic upon a just and reasonable basis with relation to other rates.

"(e) Effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by the existing depression declared in said joint resolution, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

It is apparent that it would have been utterly impossible for the Interstate Commerce Commission to examine rates, *en masse*. It, therefore, divided the proceeding into thirteen major parts and three sub-parts, all of them being entitled in Docket 17,000, Rate Structure Investigation. While the parts are separately numbered, they

are not separate entities, but constitute a single proceeding. Although the Commission has not yet made an order on the subject, it will, in the nature of things, be necessary, after completing the hearings and reports in the several parts, to equalize as among all of them. At that time the Commission will be able to determine specifically what proportion of the carriers' revenue each of the separate parts must provide in order that the carriers may enjoy the adequate return contemplated by Section 15-a of the Interstate Commerce Act. Until the whole investigation has been completed an attack upon any one of the parts, on the ground that sufficient revenue would not be realized from the rates provided, would be premature. If changes in one part of the rate structure may be set aside while the proceeding is in progress, so may all of them be set aside, and the Interstate Commerce Commission will never be able to complete its work. We take it that the grain rates fixed by the Commission are in their nature tentative. They should stand until the investigation is completed and it can be finally determined whether or not, as a whole, the rate structure will furnish adequate revenue and what each branch of the traffic should supply.

This particular part of the Investigation, Part VII, relates to grain and grain products in the western district. It, in itself, involves more than sixty major issues (R. 147). That does not mean that there are sixty or more separate proceedings under Part VII. It means that the sixty or more taken together constitute Part VII, and similarly the thirteen parts and three sub-parts of Docket 17,000, Rate Structure Investigation, constitute one proceeding.

Appellants say that the Commission gave no consideration to the relationship between rates on grain and rates

on other kinds of traffic (Appellants' brief, pp. 40-42). Practically the whole scheme of rate-making is embraced in Docket 17,000, Rate Structure Investigation. It is obvious that if the rates in each of the thirteen major parts, into which it has been divided, must be related to the rates in each of the other twelve parts before a decision in any one of them may be reached then there are no longer thirteen parts—there is only one proceeding. The proceeding was divided into parts in order to make it possible for the Commission to perform the prodigious task that Congress had assigned to it.

II. Propositions Meeting Appellants' Assignments of Error.

The order of the Commission in Part VII relating to grain and grain products is attacked on several grounds. The charges may be discussed under the propositions stated below, which fully meet the contentions of appellants:

(a) The order of the Commission is not based upon the theory that agricultural products should receive favored treatment. The order does not give them preferential consideration and does not violate Section 15.A.

(b) The Commission's order is based entirely upon the record.

(c) The Commission considered rate increases in other parts of Docket 17,000, Rate Structure Investigation, but not rate increases in non-related proceedings.

We shall discuss these propositions in their order:

(a)

The order of the Commission is not based upon the theory that agricultural products should receive favored

treatment. The order does not give them preferential consideration and does not violate Section 15-A.

Appellants charge invalidity of the order because, as they allege, the Commission disregarded the decision of the Supreme Court of the United States in *Ann Arbor R. Co. et al* v. *United States of America, et al.*, 281 U. S. 658, and continued to act on the erroneous assumption that the Hoch-Smith Resolution required it to favor agricultural products and to disregard the provisions of Section 15-A. There is nothing in the report of the Commission to which they can directly point as sustaining their position. Their contention rests on inferences based in small part on portions of the report itself, but depending chiefly upon expressions in some of the individual opinions of the Commissioners and upon decisions in other cases. As leading up to the alleged disregard by the Commission of the Ann Arbor decision, they cite certain prior decisions of the Interstate Commerce Commission itself. So far as these decisions in other cases show the attitude of the Commission with regard to the bases of rate making, we think that they are proper to be considered, but in so far as it is attempted to use them as establishing what are alleged to be proper rates they are wholly inadmissible. As shown by the authorities cited below, they are not competent to establish any fact with regard to the level of rates even if offered in evidence. There is no objection, however, to their use as showing the views of the Commission with regard to rate making, and so considered they appear strongly to sustain the contention of defendants that the order is valid.

In *Public Utilities Commission of Kansas* v. *A. T. & S. F. Ry. Co.*, 83 I. C. C. 105 (R. 327 *et seq.*), decided Oc-

tember 11, 1923, there was no order. The Commission said (R. 336-338):

> "If, as complainants contend, grain, grain products, and hay in the western group are now bearing more than their proportionate share of the transportation burden, the inference is that other commodities are paying less than their fair share. The latter have not been pointed out. Seemingly, from the record, it is improbable that a reduction in the present rates on the commodities in issue would so increase the movement of these commodities as to enable the carriers to make up to any appreciable extent the loss in revenue should a general reduction in these rates be ordered. Of prime importance to the agricultural industry and to the country in general is an adequate and efficient transportation service. The extent to which a marked rate reduction would disable the carriers generally or particular carriers in the performance of this service is of great consequence. * * *
>
> "While this case has been before us under consideration since its submission, we have given careful study to the situation presented in the western group. It is desirable that the existing record should be supplemented by a showing as to the important changes in conditions which have since occurred, and as to the lack of changes if the permanency of trends is thereby made more manifest. It will also be helpful in the proper disposition of so important a matter if the usual tests in rate cases are applied so far as they are serviceable, and if the record is made to cover more comprehensively the situation over all of the territory affected instead of being so largely centered in a particular portion of it. The present and prospective financial and service needs of the carriers should also be developed. Without indicating views as to the final disposition of the matter, the case will be reopened and set for further hearing to give inter-

ested parties an opportunity to develop the foregoing and other pertinent matters. We will enter an order to that effect."

In the Matter of Rates and Charges on Grain and Grain Products, 91 I. C. C. 105 R. 341 *et. seq.*), decided July 10, 1924, with which *Public Utilities Commission of Kansas* v. *A. T. & S. F. Ry Co., supra,* was consolidated, the Commission said (R. 400):

"In reaching our conclusion we are mindful of the opinions held by many that there should be a general revision of the rate structure of the country to give basic commodities more consideration. All we here decide is that under the facts and conditions shown by this record and viewing the present structure as a whole, the existing rates on grain, grain products, and hay are not unreasonable when the usual tests are applied.

"For the sake of clarity we add that our conclusion is not based upon the sole ground that the carriers as a whole in the western district are not making their fair return. That is only one of the considerations. Still less do we consider that when the rates assailed are shown to be unreasonable the commission's hands are bound so tightly by the provisions of Section 15-A of the interstate commerce act that we cannot grant any general reduction of the nature before us unless and until the interested carriers as a whole in their respective groups make a fair return."

It is seen that in each of the two cases just cited the Commission felt that the record was not adequate for a general revision of grain rates. It was not until Docket 17,000, Part VII, was heard that there was an adequate record upon which to found a system of grain rates. Attention is called to the language of Commissioner Meyer,

the Commissioner having the Grain Rate proceeding immediately in charge, in his concurring opinion (R. 150), as follows:

> "The record in this case for the first time presents a complete view of the existing grain rates in western territory and places before us facts upon which a revision may be attempted."

The impropriety of using prior cases to show what rate levels should be is apparent when it is considered that rate making looks to the future and is legislative, and that being legislative a determination of the Commission at one time does not bind the Commission subsequently when it has another and different record before it.

The doctrines of *stare decisis* and *res adjudicata* have no place in connection with the Commission orders, the reason being the same as that stated in the rule that one legislature cannot bind another. On its rate making side the Commission exercises legislative power, and legislative power is, of necessity, always free to re-examine and redetermine any matter that may come before it.

Manufacturers R. Co., et al. v. *United States and Interstate Commerce Commission,* 246 U. S. 457, wherein the court said (R. 481):

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (authorities), and upon which its decision, made the basis of administrative orders operating in *futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional

limits, or, for some other reason, amount to an abuse of power. This results from the provisions of Sections 15 and 16 of the Commerce Act as amended in 1906 and 1910 (authorities), expounded in familiar decisions (authorities)."

In *Virginian Railway Co.* v. *United States, et al.*, 272 U. S. 658, which was an attack upon an order of the Interstate Commerce Commission, the court said (R. 663):

"The Virginian attacks the Commission's finding of unjust discrimination. There clearly was substantial evidence to support every fact specifically found. To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province. Whether a rate is unjustly discriminatory is a question on which the finding of the Commission, supported by substantial evidence, is conclusive, unless there was some irregularity in the proceeding or some error in the application of rules of law (authorities). No irregularity in the proceedings before the Commission is even suggested."

And again (R. 665):

"The Virginian contends that the evidence before the Commission does not support its finding that the rates on coal from the Virginian's mines via the Chesapeake & Ohio are unreasonable to the extent that they exceed the New River district rates maintained by the latter carrier from mines on its own and connecting lines having no other outlet to the western markets. The argument is that these rates cannot be considered standards of reasonableness because, as the Commission declared in the present controversy, they are 'the outcome of competitive strain and stress through long periods of development,' and, as it had stated in an earlier case, they have been made 'in practical, if not

absolute disregard of distance, and all transportation conditions that ordinarily are taken into consideration in the making of rates,' and 'are below the level at which maximum reasonable rates might be maintained' (authorities). The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience' (authorities). This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it (authorities). It was shown that a huge coal traffic moves from this territory, under like operating conditions, at the blanket rates which were voluntarily established by the other carriers to serve mines similarly located. This fact, and much else in the voluminous record, afford substantive evidence to support the finding that the existing rates are unreasonable; and that those which the order directs are reasonable."

Appellants can point to no direct statement in the report of the Commission that indicates that it was under the misapprehension that under the Hoch-Smith Resolution it must, on account of the depression in agriculture, give agricultural products favored treatment. Appellants' well-worn phrase "lowest possible lawful rates" is not found in the report. In fact, the Commission's statement is that "The proceeding is instituted under the provisions of the interstate commerce act, as directed by the Hoch-Smith Resolution" (R. 76). The Commission further states that "The findings herein are under the provisions of the interstate commerce act" (R. 111).

The intention and purposes of the Commission can only be drawn from a consideration of the report, the order, the supplemental order and the several individual opinions of the commissioners.

A study of these clearly establishes the fact that the Commission gave consideration to all the factors of rate making that the law recognizes. The Commission set forth specifically the elements which it took into consideration in determining this case. It said (R. 77):

> "The question here presented is whether, under present conditions, the rates on grain and grain products throughout the western district are reasonable and just and are properly related to each other and to the rates on other traffic."

It later says what it must take into account: (a) cost (R. 81); (b) comparisons of distance (R. 77); (c) transportation conditions (R. 81); (d) ton mile and car mile earnings on grain and on other commodities (R. 77); (e) the general level of rates on all traffic (R. 77); (f) the levels and relations of rates (R. 81 and R. 147); (g) the natural and proper development of the country as a whole (R. 147); and (h) the maintenance of an adequate system of transportation (R. 147).

The cost studies and analyses, which are exhaustive, are considered and discussed in the report (R. 79-81). It is stated:

> "The record requires a general survey of the rates on grain and grain products throughout the western district from the standpoint not only of cost, but of general transportation conditions as well" (R. 81).

The Commission made plain that it considered itself obligated to make a general survey of the rates on grain and grain products on the basis of cost of transportation. It discussed fully the different methods of rate making (R. 83 *et seq.*). It concluded that the rate break or propor-

tional method of making rates would preserve the carriers' revenues (R. 93), and that the best interests not only of the primary markets, but also of producer, consumer and carrier would be best served by the full application of the rate break combinations through primary markets (R. 95). The method of making overhead through rates with transit balances was condemned as a disorganizer of rates (R. 94). The transit practices were found unreasonable, unduly preferential and prejudicial (R. 95). The finding of the Commission was certainly justified. The record shows that thirty cars of grain were kept in transit in Texas for 100 days, transported 1,500 miles and finally delivered at a point 300 miles from the original shipping point. The report characterizes the movements of these cars as a "shuttle service" between Dallas and Fort Worth (R. 104 note). These excessive transits were curtailed by the order in the interests of economy to the carrier; in other words, a reduction of the cost of service. Out-of-line hauls and back-hauls were condemned for the same reasons (R. 104), and not only is cost reduced by these curtailments but greater efficiency is also secured. Various abuses that have grown up under the transit rules were discussed and condemned (R. 106-107). Storage in transit which has been greatly abused, was found unreasonable and unduly preferential and prejudicial (R. 107). Under the supplemental order (R. 310) a charge is made for all transits of manufactured products of grain, which leave the point of origin or intermediate transit points as manufactured products, for the purpose of storage. It should be noted that these curtailments of transits, back-hauls, etc., save vast amounts to the carriers. General conditions concerning grain and grain products are discussed (R. 81-82), and in many other places throughout the report. Dis-

tances are so frequently considered that it is unnecessary to state specifically the places where they appear in the report. The mileage scales set up in Appendix D (R. 244 *et seq.*) show that the Commission fully considered distances and used them in a large measure as a basis for rate making. The general levels of rates and differentials are also discussed throughout the report. The relations of rates are discussed on almost every page. The relations of rates between grain and grain products are specifically discussed (R. 102-103). Relations of bran, shorts and middlings to other commodities are discussed (R. 105-106). Varying present rate levels and inequalities are discussed (R. 107-109). The Commission concludes that branch of the discussion as follows (R. 109):

> "We are confronted with the fact that, judged by the usual standards of transportation conditions, some of the rates in the western district, on both wheat and coarse grains, are too low, while others are too high. Horizontal treatment of such rates would perpetuate these inconsistencies. It follows that proper treatment would leave some of the rates as they are, reduce some, and increase others."

The general results of the revision of rates are treated (R. 112-115 inclusive). Very numerous specific adjustments are discussed, all involving relationships of rates (R. 116-145). Relationship between interstate and intrastate levels is considered (R. 146-147). The various other elements that were enumerated are discussed throughout the report, being the natural and proper development of the country as a whole and the maintenance of an adequate transportation system. The matters enumerated above are only a fraction of the important subjects considered in the report. There is nothing in the report, when

the whole document with the supplement, is fairly viewed, that indicates that the Commission was influenced by the idea that it must make rates to meet the depressed condition of agriculture.

Before referring to the individual opinions attention is called to the discussion of cost in the Commission's report:

Appellants complain that the Commission gave some consideration to studies of the cost of service, but that after referring to such cost studies, it reached no conclusion and made no finding with reference thereto, but merely dismissed the whole subject in an off-hand manner (Appellants' brief, 43). The appellants take a peculiar position. The cost studies (R. 79-81) were not offered by the appellants. One was prepared by the Chief of the Bureau of Statistics of the Interstate Commerce Commission, not as an official document, but as an expression of individual view, another was prepared by the Minnesota Railroad and Warehouse Commission, another by the Nebraska State Railway Commission, another was submitted on behalf of Kansas farm organizations, and the fifth was submitted on behalf of the Public Service Commission of Oregon. The record does not disclose that cost studies were offered by the appellants. The carriers severely criticized those offered. The complaint that no finding was made is not sustained by the record. The Commission said (R. 80):

> "In connection with the first four of these analyses the final showing was of a distance scale purporting to represent the lowest scale of rates that would be justified by consideration alone of cost of service plus a 6 per cent return on that part of the property assignable to the movement of wheat, and purporting to show also that rates could be materially reduced from the standpoint of cost of service."

Turning now to the individual opinion of the commissioners it is clear that cost was considered in most of them.

It is charged by the petitioners that throughout these opinions runs the belief that, notwithstanding the decision of the Supreme Court of the United States in *Ann Arbor R. Co.* v. *United States*, it was the duty of the Commision to establish unduly low rates on agricultural products in order to relieve the condition of the agricultural industry (Appellants' brief, 57-58). The charge is not sustained by an examination of the opinions. It must be distinctly borne in mind in considering this matter that a Commissioner by concurring could not change the effect of the decision. The report of the Commission is what must govern and the only purpose of considering the concurring opinions is to clear up any obscurity that may exist in the report itself. A concurring opinion cannot enlarge the statements of a report any more than a defendant can, by broad admissions, enlarge the allegations of a petition.

We take up first the subject of cost. It is clear that it was considered by most of the Commissioners in their separate opinions. Chairman McManamy discussed the subject of cost particularly with reference to transit (R. 149). He estimated that transit cost approximately $20.00 per car, and that the total yearly expense due to transit was approximately $30,000,000. Chairman McManamy's discussion discloses his conclusion that such excessive costs should be reduced. No estimate is made by him as to the reductions that will follow the decision, but it is apparent that the order and the supplemental order will cut off a large part of the unnecessary transit.

Commissioner Meyer discusses export rates and to a limited extent the subject of cost (R. 154).

If rates are to be fixed on the basis of cost, it necessarily precludes determining them on the basis of commercial conditions. The language of Commissioner Meyer expressly excludes the idea that the Hoch-Smith Resolution plays any part in the determination of the case, except that the undertaking of the investigation was directed by it. He said (R. 150):

> "It seems to be generally understood that the large task directed by the resolution is the reconstruction of the rate structure of the country. I do not understand that this direction has been affected by the recent decision of the Supreme Court of the United States in the California Fruit Case, — U. S. —, decided June 2, 1930. We are also directed to remove discriminations against the various classes of traffic, commodities, localities, and parts of the country. This report is our answer to those directions with respect to grain and grain products."

If it had been intended by Commissioner Meyer, who was the Commissioner having this proceeding immediately in charge, to respond to any other directions of the Hoch-Smith Resolution than those specifically enumerated in the language just quoted, he would have said so. The very fact that he enumerates these particular features of the resolution conclusively shows that he had excluded from his mind the idea of rate making on the basis of an economic depression.

Commissioner Eastman discusses cost (R. 15[illegible] *et seq.*). He seems still to have the idea that under the Hoch-Smith Resolution agricultural products should receive favored consideration. It appears that he is [illegible]nly Commissioner entertaining that view.

The opinion of Commissioner Eastman is relied upon by appellants (brief, 46, 72-73 and 144) as sustaining their position that the Commission, as a whole, was still of the opinion that it must give agricultural commodities more favorable consideration on account of the depression of the agricultural industry. Appellants appear to be entirely in error in that regard. Commissioner Eastman appears in the record as "concurring in part." The fact is that while he joined in the adoption of the report, it contains much with which he was not in accord and much to which he is radically opposed. In order to show Commissioner Eastman's disagreement with the report itself and the impropriety of relying upon his statements to sustain the position that the Commission itself was still under the influence of the Hoch-Smith Resolution, we quote the following from Commissioner Eastman's opinion (R. 156):

> "Although it contains much with which I am not in accord, I have joined in the adoption of the report in this proceeding because it will, on the whole, improve the existing situation, and such a report as I would prefer cannot be adopted. I know, also, that the commissioner and his assistants who have been in immediate charge of the proceedings have had an extraordinarily difficult task, and the report is the product of sincere and devoted endeavor on their part to find the right answers to the highly controversial questions which have beset them on every side. Moreover, the matters upon which I disagree with their conclusions are not one-sided. The difference of opinion is not so much one of principle as it is one of the weight to be given to established custom. But while I have, for these reasons, cast my vote for the report, I think that it may be helpful for me to tell why I would have preferred certain different conclusions.
>
> "The rates in issue are on grain and grain products. That grain agriculture is depressed admits, I believe,

of no doubt. Respondents contend to the contrary, but it is inconceivable that the cries of distress which have arisen from the western land are wholly, or even largely, fictitious. The evidence warrants no such conclusion. This depression is a fact to be taken into consideration along with other pertinent facts, in determining what rates are reasonable. The extent to which the farmer will benefit from reductions is uncertain. He may, and probably will, be helped a little, but it will not go far to solve the agricultural problem. That, however, lies beyond our province.

"In determining what are the 'lowest possible lawful rates' we must first decide what services the rates are to cover. This raises three important questions:

"1. Whether the rates should be the same on all kinds of grain.

"2. Whether they should be the same on grain and grain products.

"3. Whether or not a separate charge should be made for transit service."

(R. 168):

"*Level of the rates.*—Throughout this proceeding the Hoch-Smith Resolution has been emphasized. In a situation like that which is here presented, that resolution makes it our duty to prescribe the 'lowest possible lawful rates compatible with the maintenance of adequate transportation service.'"

Later on in his opinion Commissioner Eastman used language which does not seem to be exactly consistent with what is quoted above, but it is obvious that throughout he is explaining his disagreement with the report of the Commission and not his assent to it. His opinion should

rather be called a dissenting opinion than a concurring one. He said (R. 171-172):

"In the resolution the words 'lowest possible lawful rates' are qualified by the phrase 'compatible with the maintenance of adequate transportation service.' In order to maintain such service, carriers must in the long run be able to earn what may be termed a minimum fair profit. It is imaginable that in the western district, or certain of its regions, competitive conditions so control and limit the rates on other important traffic that the only way for the carriers to earn a fair profit is to make the rates on grain and grain products pay more than their fair share. It may be urged with much force, also, that if this fact were established it would be our duty under Section 15-A to permit the rates on grain and grain products to be maintained at such requisite level. By similar reasoning it is urged by representatives of railroad security holders that if the carriers in a given group are earning less than the fair return contemplated by Section 15-A we are estopped from requiring reductions in rates affecting any substantial volume of traffic, no matter what the level of those rates may be.

"I cannot accept this theory. Our duty under Section 15-A is to be performed in the exercise of our power 'to prescribe just and reasonable rates,' and those words in turn are to be read in the light of the Hoch-Smith Resolution. Our duty in this proceeding, as I see it, is to prescribe rates on grain and grain products designed, on the evidence before us, to cover the cost of handling that traffic plus a substantial margin of profit, although not as large a margin as might be reasonable in the case of certain other forms of traffic. It will, however, remain our duty under Section 15-A to see to it that the carriers have a general body of rates sufficient to produce, 'as nearly as may be,' the fair return stipulated by that section."

Commissioner Lewis in his concurring opinion discusses cost (R. 182-184). There is nothing in his opinion that indicates that he thought that the Commission should fix rates on the basis of economic conditions, or should give agricultural products favored treatment.

Commissioner Tate agreed with the concurring opinion of Commissioner Lewis (R. 186).

Commissioner Woodlock discussed cost (R. 186-187). His opinion clearly shows he was guilty of no misapprehension of the effect of the Ann Arbor case.

Commissioner Porter discussed the subject of cost (R. 193). His opinion fails to disclose that he was not governed by the decision in the Ann Arbor case.

The other Commissioners do not discuss cost, but none of them disagrees with the statements in the report concerning it.

We have referred to cost of service because of the great importance of that element, and because several of the Commissioners discussed it. Many other factors of rate making treated in the report also receive attention in the concurring opinions.

A reference to the supplemental report shows that in a number of respects it will increase the revenues of the carriers, although it is not mentioned in their brief. Among the items that will increase the revenues of the carriers are:

1. Limitation of the number of transit stops (R. 307-308).

2. Providing for a charge for stopping in transit of two cents per cwt. for each stop for storage of

manufactured grain products which leave the point of origin or immediate transit point as manufactured products (R. 310).

3. A minimum rate of ten cents on the prescribed interior scales authorized and in certain other cases (R. 292).

Appellants indicate in their brief (144) that there was not time for the modification of the ideas of the Commission between the date of the decision in the Ann Arbor case, June 2, 1930, and the decision of July 1, 1930, or a period of about thirty days. It is a speculation that can scarcely be urged seriously.

Appellants err in the period of time in which the subject was considered. The supplemental order modified certain provisions of the original order and granted the carriers certain increases and made the whole order, as modified, effective on June 1, 1931, upon fifteen days' filing and notice. The supplemental order was issued on April 10, 1931. Thus the order itself, as it finally became effective, was not entered until more than ten months after the decision of the Ann Arbor case. The Commission had all of that time in which to consider it, aided by very extensive applications and briefs upon the subject.

The decision in the Ann Arbor case did not in anywise relate to the great majority of issues discussed in the report. For instance, it had nothing to do with cost or with the cost studies, with the facts concerning the production of grain and the trend of movement, the rate break plan, proportional rates, transit balances, cash markets and future markets, the relation of wheat to coarse grains,

the relation of rates on grain and grain products, transit on mixed feeds, storage in transit, and all of the special relations that are discussed with regard to particular commodities and particular localities. Assuming that the Commission had formerly had in mind the consideration of the depression in agriculture in fixing grain rates, there was no reason why it should not be able to change the scales, i. e., adjust the general level of rates, within a very short time. Certainly this court will not find that the Commission did not have time to comply with the decision of the Supreme Court of the United States within twenty-eight days. It appears to us that that time was ample for re-arranging these scales. While the scales affected millions of rates, yet one change in the scales might make a hundred thousand changes in the rates. The best evidence of the Commission's ability to comply with the court's decision is that it actually did comply with it within the time stated. Moreover, its supplemental report is dated April 10, 1931 (R. 275), so that the Commission had the matter under consideration for a period of more than ten months after the Ann Arbor decision in the Supreme Court of the United States.

All that the appellants have upon which to rest their elaborate theory of the failure of the Commission to follow the Ann Arbor case are the statement of Commissioner Meyer that the rates ordered by the Commission are (R. 150) "the lowest rates on this traffic which can be lawfully prescribed" and the so-called concurring opinion, but in reality dissenting opinion, of Commissioner Eastman. Commissioner Meyer distinctly recognizes the binding effect of the Ann Arbor decision and uses the word "lawfully" in reference thereto. Commissioner Eastman's extensive opinion was not joined in by any other commissioner.

Appellants have not pointed out a single case, decided after the decision of the Supreme Court of the United States in the Ann Arbor case, in which the Interstate Commerce Commission has used the same basis of decision that it used in the Deciduous Fruit case, *California Growers and Shippers Protective League* v. *S. P. Company*, 132 I. C. C. 582, or where it has declined to follow the decision in the Ann Arbor case.

Extraordinary safeguards are thrown around orders of the Interstate Commerce Commission. They are not to be stayed without the concurrence of at least two judges in the District Courts of the United States as especially organized for such cases. The rules requiring that an injunction shall not be granted unless the grounds are clear and certain, *Phoenix R. Co.* v. *Geary*, 239 U. S. 277, under U. S. Code, Title 28, Section 380, obtain here, for Title 28, Section 47, under which the court is now acting, is in *pari materia* with said Section 380 of the Judicial Code. *Virginian Ry. Co.* v. *United States*, 272 U. S. 658 (672). See also *Missouri P. R. Co.* v. *Norwood*, 283 U. S. 249.

All orders of the Interstate Commerce Commission in one proceeding, whether original or supplemental, must be taken and construed together. *Meeker* v. *Lehigh Valley R. Co.* 236 U. S. 412 (428). In Part VII, the Grain Rate proceeding, the petitioners filed an extensive brief for rehearing, dated September 6, 1930 (R. 421), in which they set up many of the same contentions made in their brief herein. After stating the effect of the decision of the Su-

preme Court of the United States in the Ann Arbor case as overturning the Commission's interpretation of the Hoch-Smith Resolution, they say (R. 450):

> "The Commission accordingly, on page 661 of its present report, states that the findings in this case are under the provisions of the interstate commerce act. It seems apparent, however, that its decision has been influenced to a great extent by the terms of the Hoch-Smith Resolution, as previously construed by it."

The Commission denied the petition for rehearing.

On April 10, 1931, it entered its supplemental report, Exhibit "F" (R. 275) (attached to the petition), in which it is said (R. 279-280):

> "In the original report (164 I. C. C. 619), in respect of rates and practices affecting the transportation of grain and grain products throughout the western district and for export, we prescribed specific flat and proportional rates and required the construction of rates through markets on reasonably direct routes, from which proportional rates apply, by combination of flat rates to the markets and proportional rates beyond, and prohibited the application, over the routes of the market combinations, of through rates less than the market combinations, thereby prohibiting also the application of transit balances less than the proportional rates. We prescribed rates only between key points (directing the carriers to establish rates between other points in reasonable relation to the key-point rates), prescribed so-called interior scales for application as maxima where no other rates were prescribed either specifically or by reasonable relation, made definite findings on specific adjustments of rates (some in response to complaints consolidated with the general investigation), and made general findings

concerning transit practices, and specific findings concerning some phases of transit."

Under the supplemental report numerous increases in rates were ordered, and a variety of other changes was also made. The Commission, at the close of its supplemental report said (R. 315):

> "We find that the present rates and practices of respondent carriers, to the extent they do not conform to the rates and practices required in the original report and order, as corrected, modified and supplemented herein, are unreasonable and unduly prejudicial. The original report and order are corrected, modified and supplemented accordingly."

Commissioner McManamy filed the only individual opinion. He said (R. 315):

> "I approve the correction of obvious errors relating to mileage and rates which in the process of preparation unavoidably crept into the report, also the interpretations herein made of our former report and order. I do not approve other changes made in rates, groupings, or transit rules."

The other nine Commissioners (Commissioner Mahaffie did not participate) agreed with all that was said. That is the last expression of the Interstate Commerce Commission upon the subject. It effectually disposes of the contention that the Commissioners were laboring under any misapprehension concerning the effect of the Ann Arbor case, and corroborates their former statement made in the order of July 1, 1930 (R. 111), that it was made under the provisions of the interstate commerce act.

(b)

The Commission's order is based entirely upon the record.

The petitioners complain of the fact that certain checks and estimates were made without opportunity to cross-examine or to controvert them (Appellants' brief, 149). This is a far-fetched argument. The Commission was discussing the revenue effects of the increases and decreases that will follow the application of the order. Its conclusion is that they cannot be precisely stated, and in connection with that statement they say: "We have made many different checks and estimates." The Commission probably made multitudes of different checks and estimates before arriving at conclusions in this proceeding. The idea that it would have to produce all of its work sheets showing thousands of computations and that it could not make such computations without turning them over to appellants for examination, and that the Commission had to submit those who made such computations for cross-examination is almost grotesque. A reading of the paragraph in which the language is contained will dispel any notion that the Commission was going outside of the record, or doing what it ought not to have done, in considering the evidence. It is as follows (R. 147-148):

> "The action here taken represents the fullest possible response to all the mandates of the law affecting, among other things, the important subjects of levels and relations of rates, the natural and proper development of the country as a whole, and the maintenance of an adequate system of transportation. The future volume of movement of wheat and other grains between specific points cannot be accurately known. It follows that the revenue effects of the increases and decreases which will follow the effectiveness of our action herein cannot be precisely stated. We have

made many different checks and estimates. While the reductions far exceed the increases, and the corresponding revenue effects will be substantial, the full effect upon revenues cannot be adequately foretold, in view of the limitations upon transit, the elimination of transit balances outbound from primary markets, and the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates. We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation. We say this especially in the light of increased revenues already granted in certain other cases, and in the realization that a failure of the present revision to afford adequate revenues will prompt further proceedings."

(c)

The Commission considered rate increases in other parts of Docket 17,000, Rate Structure Investigation, but not rate increases in non-related proceedings.

The second objection is that the Commission took into consideration the effect of decisions in other cases. This refers to the language of the Commission just quoted above. We think that the difficulty is caused by a misuse of the word "cases". What the Commission had in mind, as appears from a consideration of the context and of the whole report, were increases that had already been granted in other parts of Docket 17,000. The succeeding paragraph shows that the Commission did not refer to unrelated proceedings, but had in contemplation the other parts of the Rate Structure Investigation. It is as follows (R. 148):

"It would be impossible to take any comprehensive action without adversely affecting certain of the conflicting interests upon this record. Nothing but experience can demonstrate what the effect will be re-

garding certain of these issues. We therefore invoke the aid of carriers in establishing the rates herein prescribed with the greatest possible expedition in order that this new rate structure may receive a speedy test. All parties should cooperate to make careful note of the effect upon their interests, with the view to bringing to our attention from time to time, after a reasonable trial, those situations which may require further consideration."

On May 6, 1930, the Commission rendered its report and decision in Part II, Western Trunk Line Class Rates, 164 I. C. C. 1. In that part very large increases were made in the rates with an estimated increase in the return of the carriers in Western Trunk Line territory of about $12,000,000 (R. 478-534).

There had already been decisions in other parts of the proceeding which included both increases and decreases. Some seven or eight parts have now been determined. The reductions in cost of service effected by the decision in this proceeding, Part VII, and the addition of the $12,000,000 to the revenues in Western Trunk Line territory very likely make up for all of the decreases in Part VII.

As stated at the beginning of this memorandum, this proceeding is a unit. It is all one proceeding consisting of thirteen parts and three sub-parts. The new rates are largely based on distance scales. It is clear that equalization among the several parts will not be difficult of accomplishment. The language just above quoted from the report of the Commission shows that the new rate structure will, if the carriers cooperate, receive a speedy test, and that other proceedings may follow for the correction of any difficulties that may be found. The large use of distance scales will, of course, facilitate the necessary alterations.

It is inconceivable that a work of such magnitude should be so nearly perfect as not to require many readjustments and revisions. Commissioner Lewis recognized the ease with which readjustments could be made. He said (R. 186):

> "The best argument that is made in behalf of the decision herein is that it creates more equitable rate structure which will lend itself to horizontal adjustments up or down."

Commissioner Woodlock in his concurring opinion also took the position that it would be easy to modify the rate structure. He said (R. 187):

> "But for the other advantages of the report and but for one fact with respect to the new rate structure that structure would, in my opinion, constitute a fatal defect which would prevent me from even a partial concurrence in the report as a whole. But one advantage of the structure herein prescribed is that it will be susceptible of horizontal change without much risk of such change producing new and widespread discriminations so that its rectification when such rectification shall be shown to be necessary should not be a matter of great difficulty. I assume that we shall be ready and prompt to rectify the structure if it shall prove, as I fear it will, to be too low."

When all the parts are determined and the proper equalization made, it may be safely presumed that the Commission will so adjust the rates as to yield the return contemplated by Section 15-A.

Transportation Act, 1920, gave the railroads of the country a new character and vested the Interstate Commerce

Commission with correspondingly increased power and duties.

Railroad Commission of Wisconsin v. *Chicago, Burlington & Quincy Railroad Co.*, 257 U. S. 563.

New England Divisions Case, 261 U. S. 184.

Dayton-Goose Creek Ry. Co. v. *United States, et al.*, 263 U. S. 456.

Docket 17,000, Rate Structure Investigation, is an effort by the Interstate Commerce Commission to perform the duties enjoined upon it by Congress. It has now completed a large part of the work in this proceeding. Are its hands to be stayed in the midst of its labors?

The Nebraska State Railway Commission represents a state that has paid excessive rates on grain and grain products because all such rates were on too high a level, and because of maladjustments that worked most grievous discriminations against the producers of this area (Commissioner Meyer's opinion, R. 151), and in favor of those of other areas. It would cause most serious injury to this state's producers if the determination of the Commission in this part of the rate investigation should be set aside.

We do not rest our case, however, on equitable reasons—forceful as they are—but on the utter failure of the petitioners to sustain their position. No order of the Interstate Commerce Commission will be set aside unless it appears clearly and unequivocally that the order transcends the Commission's power, violates constitutional guaranties, or transgresses statutory requirements. "Power to make

the order, and not mere expediency or wisdom of having made it, is the question."

Interstate Commerce Commission v. *Illinois, C. R. Co.*, 215 U. S. 452.

An affirmance of the decision of the District Court is earnestly asked.

Respectfully submitted,

C. A. SORENSEN,
Attorney General of Nebraska,
HUGH LAMASTER,
Assistant Attorney General,
Solicitors for Appellee,
Nebraska State Railway Commission.

Capitol Building,
Lincoln, Nebraska,
Nov. 21, 1931.

FILE COPY

FILED
NOV 23 1931
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 287

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

BRIEF ON BEHALF OF ARIZONA CORPORATION COMMISSION ET AL., INTERVENERS.

CLYDE S. BAILEY,
JOHN E. BENTON,
603-606 Otis Building,
Washington, D. C.,
Attorneys for said Interveners.

November 23, 1931.

THE J. W. STOWELL PRINTING COMPANY, FREDERICKSBURG, MD.

TABLE OF CONTENTS

	Page
ERVENING STATE COMMISSIONS	1
NION BELOW	2
TEMENT OF THE CASE	2
UMENT	4
MARY OF POINTS	4
1. The Commission Did Not Misconstrue The Hoch-Smith Resolution, Nor Use Other Standards Than Those Prescribed By The Interstate Commerce Act	5
2. The Commission Did Not Misconstrue Section 15a, Nor Disregard Its Requirements	35
3. The Commission Did Not Consider Matters Outside The Record	71
4. The Action Of The Commission Was Not Arbitrary	75

Cases Cited.

Arbor Railroad Co. et al. v. United States et al., 281 U. S. 658	4,8,45
ington Heights Fruit Exchange v. Southern Pacific Co., 19 I. C. C. 153	33
T. & S. F. Ry. v. United States, 190 Fed. 591, 203 Fed. 56, 231 U. S. 736	33
fornia Growers & Shippers League v. Southern Pacific et al., 129 I. C. C. 25	7
ago & Long Island Ry. Co. v. United States, 270 U. S. 287, 295	29
ton-Goose Creek Case, 263 U. S. 456	38,48,64,70
s Income of St. Louis & O'Fallon Railway Company, 124 I. C. C. 3	31
Parte 74, 58 I. C. C. 220	12
Parte 103 Fifteen Percent Case, 178 I. C. C. 539	38,51
een Percent Case, 178 I. C. C. 539	38,51
rteen Diamond Rings, 183 U. S. 176, 184	6
n and Grain Products From, To, and Between Illinois, Iowa, Minnesota, North Dakota, South Dakota, and Wisconsin Points, 122 I. C. C. 235	17,22,26
reased Rates, 1920, 58 I. C. C. 220	12
sas Public Utilities Commission v. A. T. & S. F. Ry. et al., 83 I. C. C. 105	14,29,48
ey v. Stockslager, 129 U. S. 470	6
siana & Pine Bluff Ry. Co. v. United States, 257 U. S. 114	29
nufacturers Ry. Co. v. United States, 246 U. S. 489	26
ler & Co. v. Pere Marquette R. R., 151 I. C. C. 787	7
England Divisions Case, 261 U. S. 184, 189	63
thwestern Grain Rate Case, 122 I. C. C. 235	17,22,26
n Grain Exchange v. Abilene & So. Ry. Co., 122 I. C. C. 691, 717	7,20,45
n Grain Exchange v. Arizona Eastern R. R., 126 I. C. C. 255, 281	7
burgh, C. C. & St. L. R. R. Co. v. Backus, 154 U. S. 421, 426	78
tor & Gamble Co. v. United States, 225 U. S. 282	79
Structure Investigation, No. 17,000, Part 5, Furniture, 177 I. C. C. 5	27

CASES CITED—(Continued)

Rate Structure Investigation, No. 17,000, Part 2, Western Trunk-Line Class Rates, 164 I. C. C. 1 4
Rates on Grain, Grain Products and Hay, 64 I. C. C. 85 ..12,29,46,4
Reduced Rates, 1922, 68 I. C. C. 676 14,29,47,4
Schuehardt & Gebhard v. Allen, et al., 68 U. S. 642 7
South Carolina Produce Assn. v. Aberdeen R. R. Co., 152 I. C. C. 5, 27 7,4
Southern Pacific v. Interstate Commerce Commission, 219 U. S. 433 3
Spiller v. A. T. & S. F. Ry. Co., 253 U. S. 117, 125 2
St. Louis & O'Fallon Ry. Co. v. United States, 279 U. S. 461 3
Tagg Bros & Moorehead v. United States, 280 U. S. 420, 445 1
United States v. Abilene & Southern Railway, 265 U. S. 274 7
United States v. Chaney, 228 U. S. 525 1
United States v. Tennessee, 262 U. S. 318, 324 2
Virginian Ry. Co. v. United States, 272 U. S. 658, 667 2
Western Oregon Lumbermen Manufacturers' Assn. et al. v. Southern Pacific Co., 14 I. C. C. 61 3
Wisconsin Railroad Commission v. C. B. & Q. R. Co., 257 U. S. 563, 585 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 287

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

BRIEF ON BEHALF OF ARIZONA CORPORATION COMMISSION ET AL., INTERVENERS.

INTERVENING STATE COMMISSIONS

This brief is filed on behalf of the following state commissions and boards, intervening defendants herein: Arizona Corporation Commission, Arkansas Railroad Commission, Public Utilities Commission of the State of Colorado, Public Utilities Commission of the State of Idaho, Public Service Commission of Missouri, Board of Railroad Commissioners of the State of Montana, Public Service Commission of Nevada, New Mexico State Corporation Commission, Board of Railroad Commis-

sioners of North Dakota, Corporation Commission of Oklahoma, Public Utilities Commissioner of Oregon, Board of Railroad Commissioners of the State of South Dakota, and Public Service Commission of the State of Wyoming.

OPINION BELOW

The opinion of the court below is reported 51 Fed. (2d) 510. The decision of the Interstate Commerce Commission, in the proceeding in which the order was made which is under attack herein, is reported 164 I. C. C. 619.

STATEMENT OF THE CASE

This case arises upon an appeal from an order of the United States District Court for the Northern District of Illinois denying an interlocutory injunction to restrain the enforcement of an order of the Interstate Commerce Commission prescribing maximum rates on grain and grain products moving in the Western District and in the State of Illinois or from points therein to ports of export. The Western District includes the western peninsula of Michigan, the State of Wisconsin, and all territory of all other states lying west of the Mississippi River. (Rec. 8).

The Commission's order was made in a proceeding known as *Rate Structure Investigation*, No. 17,000, an investigation instituted and carried on by the Commission in compliance with the direction of Congress contained in the Hoch-Smith Resolution, so-called, being Senate Joint Resolution 107, approved January 30, 1925, U. S. Code, Title 49, Sec. 55. The order instituting the investigation is set out in the record at page 45; the report of the Commission at page 69; and the order, which includes the report by reference, at page 273; and a supplemental report at page 275; and a supplemental amendatory order, which includes the supplemental report by reference, at page 324.

The *Rate Structure Investigation* was divided into several parts. That part in which the order here involved

was made, commonly herein after referred to as the grain rate case, was designated *Rate Structure Investigation, Part VII, Grain and Grain Products Within the Western District and for Export.* With it were consolidated for hearing twelve other proceedings involving rates on grain and grain products in the Western District. (Rec. 57)

The Commission devoted 261 days to the hearing of that part of the general investigation relating to grain rates, receiving testimony covering 53,000 pages of transcript and 2100 exhibits. (Rec. 700) Finding rates in effect unreasonable, unduly preferential and prejudicial, it made an order prescribing reasonable maximum rate scales designed to remedy these defects. This order was made July 1, 1930, to become effective October 1, 1930. Upon the petition of the carriers, however, the effective date was from time to time postponed to June 1, 1931. (Rec. 280)

The carriers filed with the Commission two petitions for rehearing, the first on September 6, 1930, and the second on November 26, 1930. (Rec. 421, 507). These were both denied, the first on November 11, 1930, and the second on March 3, 1931. (Rec. 34, 39).

The appellant carriers thereupon brought an action in the United States District Court for the Northern District of Illinois to set the Commission's order aside, alleging that the same was void upon its face. A preliminary restraining order and an interlocutory injunction were asked for. (Rec. 5) Their application was set down for hearing at Chicago on May 6, 1931 before Hon. William M. Sparks, Circuit Judge, and Hon. Walter C. Lindley and Hon. Charles E. Woodward, District Judges. No part of the evidence before the Commission was before the Court. (Rec. 699-700).

A temporary restraining order was granted on May 7, 1931, for the period of 60 days (Rec. 658). On June 30, 1931, the court filed its findings of facts and conclusions of law (Rec. 686). On July 6, 1931, the Court filed its opinion, sustaining the validity of the Commission's or-

der (Rec. 698); and on July 7, 1931, orders were entered dissolving the temporary restraining order and denying the prayer for an interlocutory injunction (Rec. 708). Appeal was taken from those orders (Rec. 709).

ARGUMENT

The appellants have filed a very extensive brief. The argument therein contains 11 chapters, which are subdivided into subchapters and sections under 53 headings and subheadings. All that is said therein, however, is directed to the support of one or another of the propositions following:

1. That the order was based upon a misconception of the Commission's powers, which arose from a construction of the Hoch-Smith Resolution which had been condemned by the United States Supreme Court in *Ann Arbor Railroad Co. et al.* v. *United States et al.*, 281 U. S. 658.
2. That the Commission in making said order misconstrued Section 15a and disregarded its requirements.
3. That the Commission in reaching its decision in making said order considered matters outside the record, and
4. That the order is void because the Commission refused to set the same aside and reopen the proceeding in which the same was made upon petitions filed by the appellant's seeking such action.

SUMMARY OF POINTS

We shall make our reply to the appellant's brief by a discussion of these four contentions directed to the points following:

1. The Commission did not misconstrue the Hoch-Smith Resolution, nor use other standards than those prescribed by the Interstate Commerce Act.

2. The Commission did not misconstrue Section 15a, nor disregard its requirements.

3. The Commission did not consider matters outside the record.

4. The action of the Commission was not arbitrary.

1. THE COMMISSION DID NOT MISCONSTRUE THE HOCH-SMITH RESOLUTION, NOR USE OTHER STANDARDS THAN THOSE PRESCRIBED BY THE INTERSTATE COMMERCE ACT.

The Hoch-Smith Resolution (43 Stat. L. 801) is a law, made by Congress, directing the Interstate Commerce Commission as follows:

> "That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various classes of traffic, and the various classes and kinds of commodities, and to make in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist."

This investigation was to be prosecuted expeditiously, and orders were expressly authorized to be made during its progress, as follows:

> "In the progress of such investigation the Commission shall, from time to time, and as expeditiously as possible, make such decisions and orders as it

may find to be necessary or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates."

The resolution gave directions respecting action upon rates applicable upon products of agriculture as follows:

"In view of the existing depression in agriculture, the Commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adquate transportation service."

This resolution had the same effect as an act of Congress, *Levey v. Stockslager*, 129 U. S. 470, *Fourteen Diamond Rings*, 183 U. S. 176, 184, *United States* v. *Chaney*, 228 U. S. 525, 531, Constitution of the United States, Article I, Section 7.

The Commission, soon after the enactment of the resolution, in compliance with the directions therein contained, instituted *Rate Structure Investigation*, No. 17,000. For the purpose of convenience this proceeding was divided into parts, in one of which the order involved in the instant case was made.

The fact, however, that the Commission saw fit thus to divide the investigation into parts, did not make the grain case, as one of those parts, an independent proceeding. The Commission was still under obligation to consider the same as a part of the whole comprehensive inquiry, ordered by the resolution, and carried on for the purpose of bringing all rates into proper relation to each other, and into conformity with the requirements of the Interstate Commerce Act. This is expressly admitted by the appellants in the sub-chapter numbered 2 beginning on page 79 of their brief.

We call attention to this fact not because we contend that the Hoch-Smith Resolution changed the standards to be applied by the Interstate Commerce Commission in determining the level at which rates applicable to any commodity should be prescribed, but because the fact that the proceeding was instituted and carried on for the purpose of complying with that resolution accounts for phraseology contained in the Commission's report, taken out of that resolution, to which appellants have in their brief sought to attach a wholly unwarranted significance.

(a) The Commission's First Construction of the Hoch-Smith Resolution.

The concluding paragraph of the Hoch-Smith Resolution was of uncertain meaning. On behalf of those urging the prescription of low rates on agricultural products it was contended that the resolution required the treatment of agricultural products as favored commodities, and the application to them of rates less than sufficient to yield a constitutional fair return upon the value of that portion of the carriers' property devoted to their transportation. The carriers, on the other hand, contended that the concluding paragraph of the resolution was not designed to prescribe a new rule for the determination of rates to be applied to agricultural products, but that it was intended to direct the Commission to proceed to the investigation of the rates applicable to such products "with the least practicable delay." The Commission appears to have adopted the first suggested construction. See *Ogden Grain Exchange* v. *Abilene & So. Ry. Co.*, 122 I. C. C. 691, 717 (decided March 15, 1927); *Ogden Grain Exchange* v. *Arizona Eastern R. R.*, 126 I. C. C. 255, 281 (decided May 10, 1927); *California Growers & Shippers League* v. *Southern Pacific et al.*, 129 I. C. C. 25 (decided July 20, 1927) commonly hereinafter referred to as the California Case; *Muller & Co.* v. *Pere Marquette R. R.*, 151 I. C. C. 787 (decided February 6, 1929); and *South Carolina Produce Assn.* v. *Aberdeen R. R. Co.*, 152 I. C. C. 5, 27 (decided February 14, 1929).

In the California case the Commission dealt with rates on deciduous fruits from California to the eastern part of the United States. It had previously in the same case (100 I. C. C. 79) held the rates assailed "not unreasonable or unduly prejudicial." Upon rehearing, however, considering the same in the light of the Hoch-Smith Resolution, the Commission found the rates unreasonable and required the same to be reduced.

That case came before this Court upon appeal in *Ann Arbor Railroad Co. et al.* v. *United States et al.*, 281 U. S. 658 hereinafter commonly referred to as the *Ann Arbor Case.* The court decided that the Commission had construed the resolution as requiring the Commission to make agricultural products most favored commodities, a construction which it held erroneous. Considering that the Commission's decision had been produced by this error of law, the order of the Commission was set aside. That decision of this court was rendered June 2, 1930. Since that date the Commission has conformed its decisions to the interpretation which the court's opinion placed upon the Hoch-Smith Resolution.

In the grain rate case the Commission specifically declared that in making the findings upon which the order was based it considered no standards other than those provided by the Interstate Commerce Act. The following is the declaration contained in the report at page 661:

> "The Supreme Court of the United States recently interpreted the Hoch-Smith resolution as setting up no standard of reasonableness of rate level or relation other than that already provided by the interstate commerce act. *Ann Arbor Railroad Company* v. *United States*,——U. S.——, decided June 2, 1930. The findings herein are under the provisions of the interstate commerce act."

(b) Grounds Upon Which Appellants Claim That the Court Should Conclude, Notwithstanding the Commission's Declaration to the Contrary, That the Order Was Produced by a Failure to Regard the Construction of the Hoch-Smith Resolution Given by This Court in the Ann Arbor Case.

The appellants, as we understand their brief, contend that the court, notwithstanding the Commission's declaration, from what the Commission said in its report and required by its order, should conclude that the Commission disregarded the construction which the court placed upon the Hoch-Smith Resolution in the Ann Arbor Case, and applied in the making of its findings and order in this case the same erroneous standard which vitiated its order in the Ann Arbor Case.

It is difficult to see how this conclusion can be reached without convicting all the members of the Interstate Commerce Commission of mis-stating what the Commission did, or, as the only other alternative, of being unable to understand what this court decided in the Ann Arbor Case. This last conclusion, however, appears not possible, for the reason that the effect of the court's decision was aptly and concisely stated in the very language we have quoted.

The appellants ask this Court to reach the conclusion that the Commission did actually disregard the Court's decision in the Ann Arbor Case upon consideration of the following facts, which appear from the face of the Commission's report and order:

(1) That the Commission finds to be unreasonable many rates which in cases previously decided (in some instances during the pendency of *Rate Structure Investigation*, No. 17,000) the Commission either approved or prescribed.

(2) That the Commission's report in the grain case does not contain findings and discussion, as to the cost of the grain rate service, and the value thereof and as to the relation of the rates on grain and grain products to the rates on other commodities and classes of traffic.

(3) That in its "General Comment", in the grain rate report, the Commission used phrases taken from the Hoch-Smith Resolution.

(4) That the order will effect a substantial reduction in the general level of the rates dealt with, notwithstanding it appears from the report that the carriers were not receiving the fair return contemplated by Section 15a.

(5) That certain individual Commissioners, in separate concurring reports, expressed doubt as to whether the rates prescribed were sufficiently high.

(6) That Commissioner Eastman in his concurring report, in discussing the Hoch-Smith Resolution, said that the resolution made it the duty of the Commission to prescribe "the lowest possible lawful rates compatible with an adequate transportation service", and argued that the Court had misconstrued the Commission's construction of the Hoch-Smith Resolution in the Ann Arbor Case.

(7) That only 30 days intervened after the decision of this Court in the Ann Arbor case before the Commission decided the grain rate case.

These several grounds for the conclusion urged upon the court we will discuss in their order.

(1) That the Commission finds to be unreasonable many rates which in cases previously decided (in some instances during the pendency of Rate Structure Investigation, No. 17,000) the Commission either approved or prescribed.

We submit that the Court can not base a conclusion that the Commission has misconceived the law upon the fact that the Commission has changed rates which, upon other evidence in other proceedings, it approved or prescribed.

Findings as to the reasonableness of rates made in one case do not become res adjudicata. This has long been recognized. A rate-making body could not meet changing conditions upon any other principle. It has always

been recognized; and was lately very clearly expressed by this Court in *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 445.

Whenever the Commission is called upon to determine the level at which rates for the future should be maintained, in order that they may not be unreasonable or unduly preferential or prejudicial, it must make that determination upon the facts then appearing. The determination rests upon administrative findings made upon evidence upon which it is peculiarly qualified to pass, and, if there be substantial evidence, such findings are not subject to judicial review. An order so based may be set aside only for error of law, and a conclusion that the Commission has erred must rest upon some other foundation than that the Commission's findings are inconsistent with findings made by it in other cases.

The reason why no conclusion that the Commission has misconceived the law may rest upon apparent inconsistencies of findings made in different cases is obvious. Each such finding is an administrative finding based upon evidence. It is impossible to say that a finding in one case that a rate is unreasonable which has before in another case been found reasonable, has been induced by a changed conception of the law. Even a guess upon that could be made only upon an examination and consideration of the evidence upon which the Commission based its different findings. But these are findings which are beyond review by the court.

Whether changes in the rates on grain and grain products which were approved in any prior case by the Commission are now necessary to place those rates upon a just, reasonable and non-discriminatory basis for the future is in each case a question of fact, which was for the decision of the Commission in the grain case. The decision rested upon the evidence in the record, which is not before the Court. In the absence of the evidence the petitioners admit that it must be deemed sufficient. It necessarily follows, therefore, that whatever changes in rates previously approved or prescribed by the Commission will be required by the order every such change was

made upon sufficient evidence that the existing rates do not conform to the standards prescribed by the Interstate Commerce Act; and such changes can afford no basis whatsoever for a conclusion that the Commission was moved to make them by a misconception of the Hoch-Smith Resolution or of Section 15a or of any other provision of law.

The Decision of the Commission in Earlier Cases Supports Its Decision in the Grain Case.

Examination of the reports of the Commission in which were involved rates which are dealt with in the order in the grain case will show that the order was made, as the Commission has stated in its report, under the provisions of the Interstate Commerce Act. In other words, such examination will make it clear that the order was not only consistent with former decisions, but was necessary to bring such rates into conformity with the standards prescribed by Sections 1 and 3 of that Act. We cite some of these cases, and comment upon them briefly.

Increased Rates, 1920, 58 I. C. C. 220, decided July 29, 1920, commonly referred to as *Ex Parte 74.* In this case all freight rates in the Western Group were increased 35 per cent; all those within the Mountain Pacific group 25 per cent, and all those between the groups by 33 1/3 per cent.

Rates on Grain, Grain Products and Hay, 64 I. C. C. 85, decided October 20, 1921. In this case the Commission ordered rates on grain and grain products reduced by the removal of one-half of the increases authorized by *Increased Rates, 1920,* and ordered that the rates on coarse grains should be further reduced to 90 per cent of the reduced rates on wheat. The Commission also found that the rates on grain and grain products *were disproportionately high.* At page 96 of its report the Commission said:

"The facts disclosed in the record make it appear that grain and grain products and hay, on the whole, are bearing a share of transportation charges which is disproportionate."

It was upon this finding, and upon the construction of Section 15a indicated, that the Commission required rates on grain and grain products to be reduced, as before stated. This was in 1921.

The Discriminatory Relationship of Grain Rates as Between Themselves Recognized.

The discriminatory character of many of the grain rates, as compared with other grain rates, became apparent to members of the Commission in the course of its investigation in the case last cited. Commissioner Lewis, in his concurring report (in which he was joined by Commissioner Hall) at page 105, said:

"The record in this case reveals that horizontal percentage increases in rates on grain, grain products, and hay, made necessary by the emergency conditions under which the Commission acted in Ex Parte 74, have greatly widened the spread between producers who are near and those who are far distant from markets. *** We recognized similar conditions in *National Live Stock Shippers' League* v. *A., T. & S. F. Ry. Co.*, supra, and sought to place the far-distant producer on a more favorable basis. Our finding in that case applies with equal force here. The exaggerated spread between the long and short haul rates, under the conditions that face us, will be unjust and unreasonable and, in my opinion, the rate reduction should be so applied as to tend to restore better relationships between producers, as was done in the case cited."

Reduced Rates, 1922, 68 I. C. C. 676, decided May 16, 1922. In this case it appeared that the carriers were still far from receipt of the 15a return. Notwithstanding this failure the Commission found all freight rates in the Western District which had not, subsequently to the *Ex Parte 74* advances, received reductions of 10 per cent, to be unjust and unreasonable, and required a horizontal reduction of 10 per cent in such rates.

This reduction was not extended to the rates on grain and grain products. It accordingly operated in very substantial degree to bring into effect again the discriminatory rate relationship which in Rates on Grain, Grain Products and Hay, in the preceding year, had been found to place upon the commodities there dealt with a disproportionate share of the rate burden.

Kansas Public Utilities Commission v. *A. T. & S. F. Ry. et al*, 83 I. C. C. 105, decided October 11, 1923. This was a proceeding instituted by the Kansas Commission to secure a further reduction in the rates on grain and grain products which should remove the disproportionate share of the rate burden resting on those commodities. The Commission held that the record was insufficient for decision. A further hearing was, accordingly, ordered, "without indicating views as to the final disposition of the matter."

Rates and Charges on Grain and Grain Products and Kansas Public Utilities Commission v. *A. T. & S. F. Ry. et al.*, 91 I. C. C. 105, decided July 10, 1924. This decision disposed of the complaint of the Kansas Commission, dealt with in the earlier case, and of an investigation of rates on grain and grain products throughout the Western District which had been instituted by the Commission. Both proceedings were dismissed.

Five of the eleven Commissioners dissented. The reasons which they gave for their dissents are significant.

Commissioner Campbell, after comparing the earnings on grain and grain products with the earnings on other classes of traffic, said:

"I think they should be reduced so as to relieve the complaining shippers of the full amount of the 1920 increases. **** An increase of less than 2 per cent in the rates on other commodities would more than make up this reduction. *** *If the multitude of so-called depressed rates now maintained by the carriers which do not bear their fair share of the transportation burden were increased to a reasonable level and the uneconomic, inefficient, and wasteful transportation under such rates, particularly over unduly circuitous routes,* were stopped, the resulting additional revenue to the carriers would equal many times the reduction contemplated in this dissent." (Italics ours.)

Commissioners McChord and McManamy concurred in the views expressed by Commissioner Campbell, and declared "that the reductions which should be made in this case should (not) in any way be conditioned upon contemporaneous offsetting increases in rates on other traffic."

Commissioner Lewis said:

"The present record affords proof that the existing rates on grain and grain products, but not hay, are unreasonable in the western and eastern districts, and on this showing I favor the removal of the remainder of the *Ex Parte 74* increases in the West, and a 10 per cent reduction in the East, the latter covering the principal movements from western producing points to the great eastern consuming regions and to the various ports for export."

Commissioner Eastman said:

"These rates can not lawfully be reduced, however, unless they are now unreasonable. *** The test must, I think, be the preponderance of the evidence, weighing it in the scales of judgment in the way to which we have been forced by the lack of

scientific principles of rate making. It is undoubtedly a close question, but I believe that *the conclusion is warranted that the rates on grain and grain products in western territory are unreasonable;* and in this opinion I am influenced chiefly by the fact that *this traffic, more particularly wheat, now seems to be bearing more than its fair share of freight charges,* taking into consideration the volume of movement, the leading and other transportation characteristics, and the trend of relative values in recent years. (Italics ours.)

"The majority have, I feel, given insufficient weight in their comparisons of car-mile and ton-mile earnings to the principle, generally accepted in rate making, that such earnings should decrease as the length of haul increases. Not only is the average haul materially greater on grain and grain products than in the case of all carload traffic, a disparity which is increased if products of agriculture are excluded from the latter total, but as a matter of fact the average car-mile and ton-mile earnings for the total are swollen by the fact that the average hauls on such low-grade commodities as sand and gravel and iron ore are comparatively short. This is merely an indication of the great care which must be exercised when such comparisons are employed. When proper allowances are made, it seems to me that they support the conclusion that the rates on grain and grain products are unreasonable."

The majority made a summary statement of reasons for the decision in part as follows:

"The present rate structure is largely the result of commercial and transportation conditions, and under it the trade and commerce of the country have grown up. Any material disturbance therein will have a tendency to cause disruption of business conditions generally to the detriment of an orderly con-

duct of commerce and with possibly serious effects upon large sums of invested capital and upon the steady employment of labor. Any marked readjustment might mean the moving of industries from points now near the source of supply of raw materials to points farther distant. *A revision involves an undertaking of magnitude and requires a large expenditure of funds not at present at our disposal.* *** *It is not enough that the present conditions may not be ideal; it must appear that something better is attainable.*" (Italics ours.)

Those who composed the majority when the decision was made were Commissioners Meyer, Aitchison, Hall, Potter, Esch and Cox, two only of whom remain upon the Commission. Of the five who dissented, three remain in office. It may accordingly be noted parenthetically that the decision in the grain case accords exactly with the decision made in 1924 by the majority of the Commissioners then in office who remain in office.

It will be noted that five of the eleven Commissioners then found that the rates on grain and grain products were disproportionate and unreasonable and should be immediately reduced, and that the majority justified their contrary finding by indicating that while the present rate structure might not be ideal, nothing better appeared attainable at the time, because, as they said, "a revision involves an undertaking of magnitude and requires a large expenditure of funds not at present at our disposal."

Grain and Grain Products From, To, and Between Illinois, Iowa, Minnesota, North Dakota, South Dakota, and Wisconsin Points, 122 I.-C. C. 235, commonly referred to as the Northwestern Grain Rate Case, decided February 8, 1927. It will be noted that this decision was rendered shortly before the decision in the California deciduous fruit rate case, which was pending at the same time. The discussion contained in the report indicates the same understanding of the effect of the Hoch-Smith Resolution which is indicated by the Commission's decision in that case.

The case involved increases in rates which the carriers proposed to make for the movement of wheat from a large area in the Northwest. *Those rates which the carriers sought to increase were the lowest rates in the Western District.* The Commission, however, refused to permit them to be increased, for the reasons stated in its report, at page 265, as follows:

> "As has been seen, the carriers' attempted justification of the suspended rates depends primarily and chiefly upon rate comparisons. Considering this showing alone, they have made out a strong case. The comparisons are very numerous, cover a wide range, and included many rates which we ourselves have fixed. They warrant the conclusion that, judged by other rates from the grain fields of the western territory to primary markets, the present rates on grain and grain products from North Dakota and Minnesota points to Minneapolis and Duluth are in general low, and that the proposed rates are in general not unduly high. There is less evidence as to the rates which move these commodities out of the primary markets, and there seems some reason to believe that certain of these latter rates, which are more subject to competitive influences, are relatively much lower than the initial rates to these markets.
>
> "It is significant, however, that the carriers' case practically ends with this showing. *** *No evidence was offered by the carriers, such as they frequently present in rate cases, with a view to showing that the earnings of the rates which they are seeking to increase are either intrinsically low, or low by comparison with the earnings derived from the rates on other commodities. No attempt was made to show the actual or the relative cost of service.* ***

"On the other hand, the evidence as to relative earnings and cost of service, which was presented by the North Dakota complainants, while not free from defects and susceptible to criticism, does clearly warrant the conclusions that the present rates of the respondents' carriers on grain products are by no means unremunerative rates, and that they yield earnings which compare quite favorably with the earnings which these carriers derive from the rates on many other forms of traffic and with the earnings which other carriers in the western group derive not only from other commodities but from grain and grain products as well.

"Upon this record we must and do find that the respondent carriers have not sustained the burden of justifying the proposed increase in rates. ***

The Hoch-Smith resolution has brought to the forefront the question of the *distribution among commodities of the transportation burden*, thus emphasizing the need for considering *the relative costs of service*, and *the relative earnings of the various kinds of freight traffic*, difficult as this task may be. ***

"It is evident, especially in the light of the Hoch-Smith resolution, that the rate structure in the northwestern and western trunk-line regions requires an analysis and investigation of a more thorough and fundamental character than it has yet received. *It is also clear from the record in this case that the rates on grain and grain products, particularly to the primary markets, are deserving of a consideration, from the standpoint of relative earnings and fair share of the transportation burden, which perhaps has not hitherto been sufficiently given them.* We have pending No. 17000, Part 7, *Grain and Grain Products within Western District*, hereinafter called the general investigation, which embraces the rates on grain and grain products in the entire western

district and from that district to the ports of the country for export. That proceeding will afford the opportunity for such consideration." (Italics ours)

Ogden Grain Exchange v. *Abilene & Southern Ry. Co., 122 I. C. C. 691, decided March 15, 1927, and Ogden Grain Exchange* v. *Arizona Eastern R. R. et al.*, 126 I. C. C. 255, decided May 10, 1927. These are the cases which are cited upon page 63 of appellants' brief, involving rates from Idaho and adjoining states to other parts of the United States. The Commission's reports in both of these cases contain reservations to the effect that the rates therein prescribed would be subject to further revision in the general investigation, the Commission saying in each case:

> "We shall leave for determination in the pending general investigation the question whether any of these rates are the lowest possible rates compatible with adequate transportation service."

It would seem apparent upon consideration of the Commission's reports in these several cases decided in 1927 that the Commission at the time they were severally decided entertained the conception of the effect of the Hoch-Smith Resolution which it commented upon in the California deciduous fruit rate case. It is further clear that the Commission decided each of said cases upon its own record, regarding rates therein prescribed or approved as temporary in nature, subject to final approval or revision upon the completion of the general grain rate case, covering the entire Western District.

From time to time during the pendency of the *Rate Structure Investigation*, No. 17,000, the Commission in various other cases likewise prescribed or approved rates which are now dealt with in the order made in the general grain rate case.

It was not until the completion of the general case that the Commission was able to take a broad survey of rates

on grain and grain products throughout the Western District, and to consider the rates in each locality or territory in comparison with the rates to and from every other locality and territory, and in the light of comparisons with rates on other commodities and evidence as to the comparative costs of moving grain and grain products and such other commodities, and in the light of all evidence necessary to a determination of the just and reasonable rates which should be applied upon a revision of the entire rate structure. When it was able to make that survey and thus to consider all existing rates applicable to grain and grain products, it was confirmed in the finding which it had first made in 1921, to the effect that grain and grain products were bearing a disproportionate share of the rate burden.

This was the conclusion which five of the eleven Commissioners had reached also in *Rates and Charges on Grain and Grain Products in 1924.* It was the conclusion which was indicated by the decision of all of the Commissioners in the *Northwestern Grain Rate Case in 1927.*

Furthermore, discriminations in the grain rates themselves against certain localities and in favor of others, upon which Commissioners Lewis and Hall had commented in 1921, were found to exist in a striking degree.

The grossly discriminatory character of the grain rate structure is illustrated by the comparison of rates set out on pages 658 and 659 of the Commission's report, (Rec. 108-109) from which it appears that some localities were paying rates more than two and one-half times as great as other localities. The Commission found that many of these discriminatory rates were among those which had been approved or prescribed by it. Under these circumstances the Commission's finding was expressed as follows:

> "We are confronted with the fact that, judged by the usual standards of transportation conditions, some of the rates in the western district, on both wheat and coarse grains, are too low, while others

are too high. Horizontal treatment of such rates would perpetuate these inconsistencies. It follows that proper treatment would leave some of the rates as they are, reduce some, and increase others."

Not only does this review of cases in which the Commission has dealt with grain rates in the Western District disclose nothing which compels the conclusion that the Commission must have obstinately or stupidly persisted in a misconstruction of the effect of the Hoch-Smith Resolution, which was condemned by this Court in the Ann Arbor Railroad Case, and that the order which is in this suit sought to be set aside was produced by that misconstruction, but *on the contrary, it leads to the conclusion that the Commission accepted and followed the construction which had been placed upon the resolution by the court, and fixed the rates which the order prescribes upon lower levels than it would have fixed them under the construction which the Commission itself had formerly placed upon the resolution.*

This appears from the following. In the *Northwestern Grain Rate Case*, 122 I. C. C. 235, as we have seen, the Commission had before it the lowest body of rates in the Western District. They were lower than the rates in other sections, and lower than rates which the Commission had itself prescribed, yet the Commission refused to permit those rates to be advanced.

This refusal was based upon evidence as to the cost of service which was before the Commission in that case. The Commission, in language which has been quoted in this brief, indicated that the rates before it were entitled to a consideration they had not before received, upon the basis of relative earnings and a fair share of the transportation burden, and gave notice that a redistribution of the rate burden would be made in the general grain rate case.

The Commission's conclusion that the rates proposed were not justified was upon the record as it then stood "*in the light of the Hoch-Smith resolution.*" At the

conclusion of the general grain rate case the carriers had made no attempt to meet the evidence as to cost of service which was before the Commission in the *Northwestern Grain Rate Case.* That record had been consolidated with the record in the general grain rate case, and the evidence as to cost of service presented by protestants at the first hearing had been substantially strengthened by further evidence produced by the experts of the Interstate Commerce Commission and of the state commissions. Commissioner Eastman, in his concurring report, quoted what had been said in the Commission's report in the Northwestern Grain Rate Case, and commented upon the significant failure of carriers to introduce any evidence as to cost of service, as follows:

"This was notice that in this general investigation we would wish to obtain all the information possible in regard to the cost of transporting grain and grain products. Several of the State commissions responded to this suggestion and at considerable trouble and expense prepared and submitted cost studies that were more or less comprehensive. Statistics and studies were also presented by our Bureau of Statistics. The carriers, however, refrained from offering any direct evidence in regard to costs and contented themselves with rebuttal evidence of fragmentary character in criticism of the studies made by others. It is their position that it is not practicable to ascertain the cost of hauling grain and grain products. Yet this has not been their position with respect to other forms of traffic, in contesting the orders of State commissions on the ground of confiscation. In *Nor. Pac. Ry.* v. *North Dakota*, 236 U. S. 585, at page 590, where lignite rates prescribed by the State were found to be confiscatory, the following was quoted from the opinion of the State court:

'As a result of the painstaking work of the accounting department of this railway company, and

its endeavors to render all the assistance possible in determining the matter of the apportionment of expense to this commodity, as is evidenced by the care and detail in accounting, the information furnished by the exhibits, and that the books of the company have been thrown open to the experts of the State, we are enabled to arrive, with a reasonable degree of certainty, at the proper proportion of expense that should be chargeable against the revenue received from the carriage of this commodity."

"The State court made a finding in dollars and cents of the amount of expense chargeable to the traffic in question, and this finding was sustained by the Supreme Court. See also *Nor. Pacific* v. *Dept. Public Works*, 268 U. S. 39, and *Boyle* v. *St. Louis-San Francisco R. R.*, 222 Fed. 539.

"Under the accounting and statistical systems now maintained by the carriers it is difficult to arrive at a wholly satisfactory approximation of the cost of handling any particular form of traffic, without a very elaborate and costly special study based on checks and observations extending over a comparatively long period of time and having for their purpose the accumulation of data which are not recorded as a matter of normal routine. However, although no such special study has here been made in any comprehensive way, *there is considerable evidence of record bearing on costs, and by the reasonable exercise of informed judgment it is possible, I believe, to arrive at conclusions with respect to the average costs of transporting grain and grain products in the western district which will not be arbitrary but within reasonable limits of accuracy.* *** (Italics ours.)

"Returning to the question of transportation cost, the basic evidence upon this question is that furnished by our Bureau of Statistics. It will be well, I think, to describe this evidence a little more fully

than is done in the main report. The object was to arrive from the statistics of Class I railways at a reasonable approximation of the cost of transporting grain in the western district. *** Return on book value was figured on a 4 per cent and also on a 6 per cent basis, producing alternative final total unit costs. With these data total costs per 100 pounds of transporting each of the general classes of grain and grain products for 200,.300, 400, and 500 miles were determined, thus furnishing the rudiments of a scale.

"This is stating the process followed by the bureau, of course, very briefly and baldly. *It was supported by testimony of the director of the bureau, giving in detail, as the result of his years of experience, observation, and study, the reasons for what was done, including any assumptions that might on their face seem arbitrary.*

"The result may be checked by the criticisms of the State Commissions, backed in some instance by very elaborate special studies of their own, and by criticisms of the carriers." (Italics ours)

It therefore appears that when the report in the general grain rate case was made the evidence to sustain the reasonableness of the rates then in effect in the Northwest was much more complete than when in the *Northwestern Grain Rate Case* the Commission had refused to permit those rates to be advanced. Nevertheless the Commission's order resulted in substantially increasing a very large part of those rates.

The conclusion to be drawn seems obvious. The Commission has prescribed rates, as it asserts in its report, according to the standard of Interstate Commerce Act instead of according to the standard which it previously conceived to have been established by the Hoch-Smith Resolution. *The result is a substantial advance in rates in the Northwest, and substantially higher levels of rates throughout the Western District, than we should have had but for the decision of the United States Supreme Court in the Ann Arbor Railroad Case.*

(2) That the Commission's Report in the Grain Rate Case Does Not Contain Findings and Discussion as to the Cost of the Grain Rate Service and the Value Thereof and as to the Relation of the Rates on Grain and Grain Products to the Rates on Other Commodities and Classes of Traffic.

It is singular that the appellants should venture to attack the Commission's order on this ground, in view of the comment which was made in the *Northwestern Grain Case* (122 I. C. C. 235) upon their failure to present evidence which would enable such findings in that case, and the clear notice which was given them in the report in that case that they should present such evidence in No. 17,000, and in view of their complete failure to offer such evidence, after such notice. This failure is commented upon in Commissioner Eastman's concurring report in the grain case (Rec. 170), which we have quoted from in this brief.

If the appellants saw fit to refrain from offering evidence on these several matters, as it appears they did, they are scarcely in a position to complain because findings were not made.

The appellants, however, do not claim that they were not given full opportunity to produce whatever evidence they sought to produce touching these matters. They point to the absence of findings thereon, asserting that it is persuasive evidence that the Commission considered itself under no obligation to apply established standards of rate-making when dealing with rates on products of agriculture. The fact that the particular findings and comparisons mentioned were not made in the grain case, however, is not open to any such construction.

While the original Act to Regulate Commerce required findings by the Commission to which was given the effect of prima facie evidence, the Hepburn Act in 1906 so amended Section 14 "as to dispense with the necessity of formal findings of fact except in cases where reparation or damages are involved." *Manufacturers Ry. Co.* v.

United States, 246 U. S. 489; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 667.

Sometimes the Commission in a rate case includes findings as to comparative rates and costs, and data bearing on the value of transportation of the particular traffic moved,—and sometimes it does not. To argue that because the Commission did not make these findings and comparisons in the grain rate case the Commission evidently considered grain rates, under the provision as to lowest possible lawful rates in the Hoch-Smith Resolution, free from determination by the usual Interstate Commerce Commission standards, is altogether fanciful. There is perhaps no better demonstration of this fact than to point to the Commission's decision in *Rate Structure Investigation No. 17,000, Part 5, Furniture*, 177 I. C. C. 5. In that case there is a complete absence of findings as to cost of service and value of service and findings and comparisons as to the levels of furniture rates and rates on other commodities. If such absence of findings and comparisons has the significance claimed by the appellants, then it must be assumed that the Commission, at the time it fixed rates on furniture, believed that it was dealing with products of agriculture.

(3) That in its "General Comment" in the Grain Rate Report the Commission Used Phrases from the Hoch-Smith Resolution.

We have already pointed out that the grain rate proceeding was a part of the general investigation which the Hoch-Smith Resolution directed. This Court in the Ann Arbor Case did not hold that the Hoch-Smith Resolution was unconstitutional or without effect. Furthermore, this Court did not hold that the last paragraph of the resolution was invalid. It simply ruled that the direction contained in the paragraph "must be held to work no substantial change in the meaning or operation of Secs. 1(5) 3(1), and 15 par. (1) of the existing law."

The words directing the Commission "with the least practicable delay" to effect lawful changes in the rate structure of the country which should cause the products of agriculture to move "at the lowest possible lawful rates" were given judicial construction which left them valid law.

The resolution continued the duty of the Commission to proceed with the rate investigation and revision directed by the Congress, but to establish rates only on levels determined by the application of standards found in the Interstate Commerce Act. Rates on products of agriculture fixed by such standards, according to the judgment of the Commission, upon a just and reasonable basis, are "the lowest possible lawful rates." The Hoch-Smith Resolution was thus continued in effect, in all its parts, as so construed by this Court. Any phrases out of the same used by the Commission, or by any Commissioner, in the grain rate case, will be deemed to have been used in the proper sense which was given to the same by this Court in the Ann Arbor Case.

Because the Commission was executing a command laid upon it by the Congress in the Hoch-Smith Resolution, and because the resolution directed that the rates established should be "compatible with the maintenance of an adequate transportation service," it was appropriate and desirable that the Commission in its report should include the finding,—which the appellants strangely have so much emphasized and relied upon,—that the readjustments ordered "will not threaten the maintenance of an adequate system of transportation."

For the same reason, if the Commission in its report (as it did not) had denominated the rates which it prescribed "the lowest possible lawful rates" that phrase would have been construed in the sense given to it by this Court, and the validity of the order would have been in no wise affected.

(4) That the Order Will Effect a Substantial Reduction in the General Level of Rates Dealt with, Notwithstanding It Appears from the Report That the Carriers Were Not Receiving the Fair Return Contemplated By Sec. 15a.

The fact that reductions are required by the order when the carriers are not receiving the Sec. 15a return does not show that the Commission used unlawful standards in determining the level of the rates to be established. The evidence upon which the Commission acted is not before the Court; but it is conclusively presumed sufficient to support the Commission's finding that such rates were unreasonable to the extent that they exceeded the prescribed level. *Louisana & Pine Bluff Ry. Co.* v. *United States*, 257 U. S. 114; *Spiller* v. *A. T. & S. F. Ry. Co.*, 253 U. S. 117, 125; *Chicago & Long Island Ry. Co.* v. *United States*, 270 U. S. 287, 295; *United States* v. *Tennessee*, 262 U. S. 318, 324.

We have already seen that rates on grain and grain products were found disproportionately high in *Rates on Grain, Grain Products and Hay*, 64 I. C. C. 85, in 1921, and reduced 10 percent, and that thereafter, in consequence of a reduction in other rates following *Reduced Rates, 1922*, 68 I. C. C. 676, this discriminatory relationship was restored: and we have also seen in *Rates and Charges on Grain and Grain Products*, 91 I. C. C. 105, decided in 1924, five of the eleven Commissioners then sitting favored a reduction at that time, and that the discriminatory relationship between rates on grain and grain products and other rates was then recognized.

The appellants admit that if the rates are above the bounds of reasonableness the Commission may reduce them, notwithstanding the carriers are not receiving the Sec. 15a return (Appellants' Brief, page 101). The Commission did so find.

(5) That Certain Individual Commissioners, In Concurring Reports, Expressed Doubt As to Whether the Rates Prescribed Were Sufficiently High.

(6) That Commissioner Eastman, In His Concurring Report, in Discussing the Hoch-Smith Resolution, Said That the Resolution Made It the Duty of the Commission to Prescribe "The Lowest Possible Lawful Rates Compatible With an Adequate Transportation Service"; and Argued That the Court Had Misconstrued the Commission's Construction of the Hoch-Smith Resolution in the Ann Arbor Case.

These separate utterances of Commissioners call for short comment. There is nothing in any of the concurring reports in any way inconsistent with what is said in the majority report. But if there were, an opinion of the majority can not be invalidated by what some concurring Commissioner may see fit to say in a separate report. If it could be thus invalidated, an effective method would be open to any dissenting Commissioner to control the action of the majority.

The appellants, at page 104 of their brief, cite two cases as authority for their contention that the Court may determine the basis of the Commission's action from concurring or dissenting utterances of the minority. The cases cited, however, do not support the contention. We examine these briefly.

In *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, the Court was dealing with an order of the Commission made in *Western Oregon Lumbermen Manufacturers' Assn. et al* v. *Southern Pacific Co.*, 14 I. C. C. 61. The Court's conclusion that the order was produced by an erroneous construction of law was based not upon utterances in a dissenting report, but upon the language of Commissioner Prouty in the majority report, which abundantly supported, if it did not compel, the conclusion. The Court was construing *the language of the majority report* in the light of surrounding circumstances.

The order was set aside because the Court concluded that it rested "on the belief by the Commission that it had the right, under the law, to protect the lumber interests of the Willamette Valley from the consequences which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate."

With reference to the dissenting report, the opinion of the Court in full was as follows:

> "Manifestly, this was deemed by the Commission to be the power which was being exerted, since Mr. Commissioner Harlan, joined by the Chairman of the Commission, dissented on the ground that the order was an exertion of a power not possessed, to give effect to a supposed equitable estoppel, and no language was inserted in the opinion to indicate to the contrary."

In other words, the language of the majority report, as the Court will see upon examining the same, plainly indicated that the Commission was attempting to exercise the power mentioned, and the dissenting Commissioners had dissented on the ground that no such power was vested in the Commission.

The Court also pointed out that the syllabus of the Commission's report asserted that the damage to the lumber interests which would result from the proposed rate changes "is an important consideration in passing upon the reasonableness of such advance."

St. Louis & O'Fallon Ry. Co. v. *United States*, 279 U. S. 461, is a case in which the Court dealt with a recapture order made by the Interstate Commerce Commission in *Excess Income of St. Louis & O'Fallon Railway Company*, 124 I. C. C. 3. In that case also the conclusion of the Court that the order of the Commission was produced by an error of law rested *upon the language of the majority report* construed in the light of the dissenting and concurring reports. The question was whether the Commission had given consideration to reproduction cost, in

reaching its conclusion as to the value of the plaintiff's property. Most of the very extended report of the majority was devoted to an argument to show why no consideration should be given to that element. The method which the Commission had followed in the determination of the value reported was described at great length. It necessarily excluded any consideration of reproduction cost as for the years for which the values reported were found, as this Court will perceive upon an examination of the report.

The reference to dissenting and concurring reports in the opinion of the Court was as follows:

> "Four dissenting Commissioners declare that reproduction costs were not considered; *and the report itself confirms their view.* Two of the majority avow a like understanding of the course pursued.
>
> "The following from the dissenting opinion of Commissioner Hall, concurred in by three others, accurately describes the action of the Commission:—" (Italics Ours)

An examination of the majority and dissenting reports will show that the statement of Commissioner Hall was merely a condensation of a more extended statement contained in the majority report which the Court adopted for conveniently setting forth in the opinion the action of the Commission which was held not in accordance with law.

Neither of these opinions is authority for the consideration of language in a report of a dissenting or concurring minority of the Commission for the purpose of negativing a perfectly unambiguous statement in the report of the majority, or even for the purpose of reaching a conclusion that findings and an order to support which there was evidence before the Commission were produced by an error of law which is not indicated by any discussion whatever in the majority report.

A majority of the Commission may say in a report that the Court erroneously misconstrued and set aside

former report of the Commission without thereby invalidating an order of the Commission which rests upon the second report. This will appear very clearly from a perusal of the reports and opinions in the so-called lemon rate case, *Arlington Heights Fruit Exchange* v. *Southern Pacific Co.*, 19 I. C. C. 153, 22 I. C. C. 149; *A. T. & S. F. Ry.* v. *United States*, 190 Fed. 591, 203 Fed. 56, 231 U. S. 736.)

(7) That Only 30 Days Intervened after the Decision of This Court in the Ann Arbor Case Before the Decision of the Commission in the Grain Rate Case.

Comment is made upon the fact that but 30 days elapsed between the decision of this Court in the Ann Arbor Case and the decision of the Commission in the grain case. In their brief below appellants said:

> "It would have been literally impossible for the Commission in the 30 days intervening between the decision of the Supreme Court and the entry of its order to have reviewed the record (consisting of 53,000 pages of transcript and 2,000 exhibits) in the light of that decision.
>
> "It would have been impossible within this thirty-day period for the Commission maturely to have reconsidered its determination of the 'three score and more major issues' and to reach new conclusions thereon in harmony with such decision."

At page 144 of their brief filed in this Court appellants say:

> "At the time of its decision (the Ann Arbor Case) this case had been under review by the Commission, after submission, for a period of eleven months (R. 69). The final report was in course of preparation as early as November 1929, seven months prior to the decision of the Court (R. 21). The record consisted of over 53,000 pages of transcript and more

than 2,000 exhibits (R. 147). More than three scores of major issues were involved (R. 147). It is not surprising if the Commission, including Mr. Eastman, within the thirty days available, failed to perceive the full import of the Court's decision and to reexamine this enormous record in the light thereof, but by reason of such failure of perception perpetuated in part, if not in whole, the error under which it had therefore conducted and considered the case."

We submit that there was no occasion to review the 53,000 pages of transcript and the 2,000 exhibits. In view of the facts commented upon by appellants,—that at the time the Ann Arbor Case was decided the Commission had held the case under consideration after submission for eleven months, and for seven months after its report was in course of preparation,—the conclusion is obvious that the Commission, at the completion of its study of the evidence in the grain rate case, was awaiting the decision of this Court in the Ann Arbor Case for guidance in making its order in the grain case.

We do not consider it necessary to argue that the period of one month is quite sufficient to enable Mr. Eastman and his associates to perceive the full import of the decision which the Court rendered in that case. So far as any revision of the Commission's order made necessary by the decision is concerned, it would not be time-consuming. All the Commission needed to do was to determine the percentage by which rate scales determined upon should be varied to bring the rates up to the standard of reasonableness required by Section 1 of the Interstate Commerce Act. Beyond that the task was simply a mathematical problem, which could be accomplished by subordinates in a few days' time. The ease with which rate changes could be effected, once the rate scales contemplated in the report were determined upon, was commented upon by Commissioner Woodlock in his concurring report at page 737 (Rec. 187).

In the court below counsel for the appellants stated that all that was necessary to meet their complaint presented by this action was to increase the prescribed rate scales by 13 percent. Whatever the percentage which may have been involved, it is obvious that any change which was made necessary by the Court's decision was a no less simple matter.

2. THE COMMISSION DID NOT MISCONSTRUE SECTION 15a, NOR DISREGARD ITS REQUIREMENTS.

The appellants' claim with respect to the proper application of Section 15a is not altogether easy to understand. Various rather voluminous sections of their brief are devoted to attempted support of their claim that the Commission misconstrued Section 15a, and failed to give proper effect thereto, but nowhere can be found a clear and concise statement of their claim either as to what Section 15a requires the Commission to do, or as to what the Commission did or failed to do in violation of such requirement.

Endeavoring to ascertain what their claim is in order that it may be discussed, we abstract the following. At pages 87, 90 and 92 of their brief the appellants say:

> "(A) Sections 1, 5 and 15a must be read together. Section 15a qualifies and controls the powers which may be exercised under Sections 1 and 15 in any case, where the Commission is required to give the former consideration. ***
>
> "This section (15a) casts an affirmative duty upon the Commission. It requires that it 'shall' so establish or adjust rates as to accomplish the purpose stated. This duty it is to perform 'in the exercise of its power to prescribe just and reasonable rates' (i. e., in the exercise of the powers conferred by Sections 1 and 15). The three sections are thus linked together, and the standard created by Sec. 15a must be read into and becomes a part of the standard

created by Sec. 1. In any case in which the Commission is required to give effect to Sec. 15a, that section, in addition to casting an affirmative duty upon the Commission, limits the powers which it might otherwise have exercised under Sec. 1, ***

"Moreover, prior to the enactment of Section 15a, there was no standard whereby the adequacy of the revenues of the carriers as a whole, or in any given section of the country, was required to be measured. Theoretically, any railroad was protected against the imposition by public authority of rates, the general level of which, or which taken as a whole, failed to produce a fair return upon the value of its property. As a practical proposition, it could not obtain relief therefrom, however, unless the competing railroads in its own section were in a position to make the same showing. *** There was, therefore, no legal standard for the measurement of the adequacy of the railroad revenues as a whole.

"Congress by Section 15a provided such a standard. In so doing it provided for application to the revenues of the railroads, as a whole, the rule of the Fifth and Fourteenth Amendments as applied to the rates of a single public utility. ***

"The purpose and effect of Section 15a was, therefore, to substitute for the old system of regulation, under which the railroads, as a whole, were permitted to earn a fair return out of the aggregate of separately established rates, if sufficiently high for the purpose, a new rule of rate-making designed to insure such a return and to impose upon the Commission the affirmative duty so to adjust rates as to accomplish such result.

"Although the purpose was to provide for the maintenance of an adequate transportation system, Congress did not leave to the determination of the Commission either the standard by which the attainment of this object was to be achieved, or the measure of its attainment. It itself provided the standard by requiring that the rates should be such as to pro-

vide, as nearly as might be, a fair return upon the aggregate value of railway property, and the means of its realization by directing the Commission so to adjust the rates. ***

"It follows

(1) That Sec. 15a *** imposes upon the Commission the positive duty to establish such rates as to achieve such result as nearly as may be;

(2) That the rate structure and the level of the rates to be established are to be determined by reference to the required rate of return, not by conclusions of the Commission independently thereof as to what is good for the country or the carriers, or what kind of structure is sufficient for maintenance of an adequate system of transportation."

From the foregoing, if not negatived by any other portion of their brief, we should understand the appellants to claim that Section 15a in effect amended Sections 1 and 15 so that now the Commission's power is limited to the extent that it may no longer reduce rates which it finds to be unreasonable unless the Section 15a return is being earned; that whereas it was formerly the Commission's duty to exercise its judgment, and to establish rates upon a level found by it to be just and reasonable, in view of all evidence relative to the question of reasonableness, it is now the Commission's duty to denominate rates "just and reasonable" which will produce the Section 15a return, and to establish those rates;—in short, that Congress by the statute has displaced the old standard of reasonableness, and created a new standard, under which the level of rates is to be determined "by reference to the required rate of return" under Section 15a, "not by conclusions of the Commission independently" arrived at by the exercise of judgment upon the consideration of all evidence before it bearing upon the question of reasonableness.

In other words, we should understand the appellants' claim to be that the question of reasonableness is, under

the provisions of Section 15a, conclusively determined by the rate of return which has been fixed as fair under that section, and by the contribution necessary to be made from the traffic covered by rates under consideration to yield its proportion of that return, without regard to any other considerations affecting reasonableness.

This coincides with the construction of Section 15a which was claimed by these same carriers at page 12 of their brief filed with the Interstate Commerce Commission in *Ex Parte 103*, 178 I. C. C. 539, commonly called the *Fifteen Percent Case*, on September 16, 1931, by some of the counsel who have filed their brief in this case. In that brief, following quotations from the opinion of this Court in the *Dayton-Goose Creek Case*, 263 U. S. 456, they said:

> "The statements which we have quoted from this opinion show that rates, otherwise reasonable, become unreasonably high if the general schedule of rates, of which they are a part, produces more than the fair return prescribed by law. *It follows, irresistibly,* from this conclusion that the converse is true—*that rates, otherwise reasonable, become unreasonably low if the general schedule of rates, of which they are a part, produces revenues which in the aggregate fail to attain the results contemplated by the prescription of Section 15a. It is thus apparent that in any case involving the reasonableness of an increase or decrease in the general rate level, the revenue consideration is paramount and controlling.*" (Italics ours)

The appellants, however, after first presenting in their brief the language we have quoted, seem to make retreat from that claim, and to present another. Proceeding with their discussion as to the construction of Section 15a, they, at pages 94, 95 and 101 of their brief, say:

> "The duty imposed is to be performed by the Commission 'in the exercise of its power to establish just

and reasonable rates.' This power had already been conferred by Sec. 1. Prior to the enactment of Sec. 15a it had long been recognized that there was no absolute measure of a reasonable rate but that there was a zone of reasonableness within which any rate might be reasonable and just under Sec. 1. Such fact was recognized by the court in *American Express Co.* v. *Caldwell*, 244 U. S. 617 (624). In the fixing of rates under Sec. 1, considered independently of Sec. 15a there is therefore a certain latitude of judgment to be exercised.

"In *Grain and Grain Products*, supra, the Commission, speaking of the phrase 'lowest possible lawful rates' referred to in the resolution, said:

> 'It sets no new standard of lawfulness, but provides, in effect, that to the extent that there are flexible limits to our discretion, we shall require the maintenance of the *lowest rates falling within those flexible limits.* ***'

The 'lowest possible lawful rates' are thus defined as the 'lowest rates falling within the flexible limits of the Commission's discretion.' This of necessity means that there are other and higher rates which might, within the limits of such discretion, have been established, and if established, would have been reasonable and lawful.

"The effect of Sec. 15a is to require the Commission so to exercise this discretion. Otherwise the requirement of Sec. 15a that the Commission shall so exercise its powers under the earlier sections as to produce such result, is meaningless. ***

"Sec. 15a does not prohibit the Commission from reducing particular rates or classes of rates when clearly unreasonable, i. e., above the upper boundary of the zone of reasonableness. It does forbid the Commission, (in a case where the existing rates are above the upper boundary of the zone of a reason-

ableness, just as much as in a case where the existing rates are within the zone of reasonableness), either to fix *all* rates at the lowest possible lawful level, thus preventing *all* possibility of achieving the statutory rate of return, or to fix the rates of any major description of traffic at the lowest possible lawful level, where the effect is *pro tanto* to prevent the receipt of such return. The Commission may not, therefore, establish the lowest possible lawful rates on a substantial volume of traffic, where the carriers' rate of return is at the time inadequate, or in the absence of a specific finding that it exceeds or in the near future will exceed the statutory rate."

This then appears to be the appellants' construction of Section 15a, so far as it places an obligation upon the Commission;—that it requires the Commission, when prescribing rates (if the carriers are not receiving the Section 15a return) to place such rates as high as they can be placed without exceeding the bounds of reasonableness. It is this alleged requirement of the section, to which they claim the Commission failed to give effect by reason of a misconception of the true construction of the section.

To prevail on this branch of their case, the appellants must establish this failure to give effect to Section 15a, by what appears on the face of the Commission's report. They rely upon the following: (1) That the Commission's order substantially reduced the general level of the rates involved at a time when the appellants were not receiving the Section 15a return. (Appellants' Brief, page 82): (2) That the Commission in its report, referring to Section 15a, used the following language: "which (section) we construe to permit, but not to guarantee, the carriers to earn 5.75 percent on the fair value of the property devoted to the transportation service." (Appellants' Brief, page 110.) (3) That Commissioner Meyer, in his concurring report, referring to the rates prescribed, said that the same were "the lowest rates on this traffic which can be lawfully prescribed." (Appellants' Brief, page 103).

To summarize, the appellants claim (1) that Section 15a requires the Interstate Commerce Commission to prescribe rates as high as they can be made without exceeding the bounds of reasonableness, if that be necessary to yield the carriers the Section 15a return; (2) that it appears from the report that the carriers are not receiving the Section 15a return; (3) that it also appears that a substantial reduction in the general level of grain rates has been made by the order; and (4) that it further appears that the Commission fixed the rates prescribed as the "lowest possible lawful rates" which "of necessity means that there are other and higher rates which might *** have been established, and if established would have been reasonable and lawful."

Inasmuch as the appellants' entire claim respecting misconstruction and misapplication of Section 15a depends upon establishing this last contention, viz. that the rates prescribed are the "lowest possible lawful rates", in the sense of being lower than other reasonable rates which the Commission might have established, we proceed to a discussion of that claim.

(a) The Rates Prescribed by the Interstate Commerce Commission Conformed to the Requirements of Section 15a According to the Appellants' Own Construction of that Section.

If, for the purposes of immediate argument, we accept the construction of Section 15a which appellants present (and we accept it for such purpose of argument only), the rates prescribed by the Commission conform to the requirements of the section. It is only by rejecting the plain terms of the Commission's report and order, and by substituting their own, that the appellants can make argument otherwise.

The carriers claim that Section 15a requires the Commission to fix rates upon the upper border of the zone of reasonableness. That is exactly what the Commission has done. Its finding in its report upon this point is as follows:

"We find that the present rates on wheat and coarse grains and their products are *unreasonable and unduly preferential and prejudicial to the extent they exceed the rates prescribed in Appendix D.*" Rec. 111 (Italics ours).

The order of the Commission is that the carriers shall establish "rates which *shall not exceed* those prescribed in Appendix D." (Rec. 274)

Since the appellants admit that rates which were found by the Commission to be above the zone of reasonableness may be reduced to the upper border of that zone notwithstanding the carriers may not be earning the Section 15a return, there is no ground afforded by the language of the report and order for the complaint that the rates prescribed do not conform to the requirements of Section 15a as so construed. The rates prescribed are found by the Commission to be the *maximum rates which can be enforced without passing the bounds of reasonableness.* They conform to the appellants own construction of Section 15a.

(b) The Phrase "Lowest Possible Lawful Rates" Can Not Be Substituted for the Actual Language Used by the Commission.

The appellants, however, seek to make good their claim by doing violence to the report. They say, on page 103 of their brief, "The rates prescribed were prescribed *as the lowest possible lawful rates.*" This assertion flatly contradicts the language of the report and the order. The appellants seek to sustain their contradiction by quotation of two fragments from the concurring report of Commissioner Meyer. At page 103 of their brief appellants say:

"Commissioner Meyer, whom the report shows to have been the Commissioner in immediate charge of the proceeding said:

'The rates prescribed lie within the zone of reasonableness, but they are the lowest rates on this traffic which can be lawfully prescribed.' (R. 150)

Later on, answering the demand of certain interests for reduction in the export rates, the Commission says:

'*** But even if they (emergency export rates established by the carriers) had produced the desired effect we would still be without power to compel the railroads to publish them unless the rates fell within the zone of reasonableness. It is my understanding that many of these rates were established on a level below that zone. Whatever the facts may be in this regard, we are establishing herein rates as low as we can lawfully prescribe. ***' (R. 153).

These statements in Commissioner Myer's report the appellants treat as the equivelant of a declaration that the rates prescribed are "the lowest possible lawful rates"; and they build the entire structure of their argument concerning Section 15a on the substitution of that phrase for the language which Commissioner Meyer actually used, and thereupon the substitution of such altered language of Commissioner Meyer for the language in the report and order, actually used by the Commission. Having made the substitution, they reach the conclusion that they have established invalidity of the order.

The complete answer to the argument of the appellants is that there is nothing in the report of the majority of the Commission to support the substitution of language which they attempt, or which can be construed to effect the equivalent of such substitution.

The appellants quote from the Commission's report the following:

> "The question here presented is whether, under present conditions, the rates on grain and grain products throughout the western district are reasonable and just and are properly related to each other and to the rates on other traffic. The answer must take into account not only comparisons of distance, transportation conditions and ton-mile and car-mile earnings on grain and other commodities, *but also whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by law, including section 15a of the interstate commerce act, which we construe to permit, but not to gaurantee, the carriers to earn 5.75 per cent on the fair value of the property devoted to the transportation service,* (R. 77, Appellants' Brief, page 110) (Italics are the Appellants')

The appellants assert, however, that the Commission did not conform to this requirement. At page 111 of their brief they say:

> "Section 15a while not a guaranty is more than a permission. It casts upon the Commission an affirmative duty to adjust and establish rates conformable thereto****. This duty rested upon the Commission in every part of this proceeding. Instead of recognizing the true relation of Section 15a to the general rate structure investigation and to every part of it, the Commission apparently proceeded upon the theory that the rates on the several descriptions of traffic involved in each of its numerous subdivisions were to be independently considered, the net revenues of the carriers thus becoming whatever they might become under the aggregate of the rates thus established."

It is clear that the language of the Commission's report quoted above fully recognized the Commission's duty under Section 15a. There is furthermore other evi-

dence in the report that the Commission did exactly what the appellants in the language just above quoted have said to be the Commission's duty. The Commission considered not only the revenues which would be produced by the rates fixed in this order covering grain and grain products traffic, but also the revenues which would be derived from rates applicable to other traffic.

In its report the Commission said:

> "We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation. We say this especially in the light of *increased revenue already granted in certain other cases,* and in the realization that a failure of the present revision to afford adequate revenues will prompt further proceedings." (Rec. 149)

We point to this language quoted from the Commission's report as proof that in fixing rates in the grain case the Commission did not consider those rates independently, but considered the grain rate proceeding as a part of the general rate structure investigation, just as the appellants claim it should have done.

(c) Interpretation of the Language of the Grain Report in the Light of Other Reports of the Commission.

What the Commission in the grain report meant to declare to be its duty under Section 15a seems clear enough from the language it used in that report, but if there be any possible ambiguity about it, which would justify such resort as the appellants attempt to other reports,—to the separate reports of individual Commissioners, and to former reports of the Commission itself, such as the *Ann Arbor Case, Muller & Co.*, v. *Pere Marquette R. R., South Carolina Produce Assn.* v. *Aberdeen R. R. Co.*, and the *Ogden Grain Exchange Cases,* cited in the appellant's brief, all decided by the Commission before the Hoch-Smith Resolution was interpreted by this Court,—then

reference to reports of the Commission where the question of construction of Section 15a was explicitly dealt with, and where some of the language used in that connection in the grain report was first used, will make the true meaning of the language of the latter report entirely clear, and will show that the Commission in the grain case construed Section 15a as placing upon it the duty to do exactly what the appellants say it should do under that section, viz, everything within its power in the performance of its duty to enable the carriers to receive the return fixed under Section 15a, short of permitting rates to be maintained which would exceed the bounds of reasonableness when measured by the standards prescribed by the Interstate Commerce Act.

We cite some of those cases in the paragraphs following, which show that from the time of the enactment of Section 15a until now the Commission has continued to construe Section 15a as placing upon it a duty to do all within its power to enable carriers to receive the Section 15a return, but without allowing the imposition of rates passing the bounds of reasonableness.

Rates on Grain, Grain Products and Hay, decided October 20, 1921, 64 I. C. C. 85. In this case, at page 98, the Commission said:

> "We are to administer, and, so far as possible, give force and life to all the provisions of the interstate commerce act. Section 1 requires that no more than just and reasonable rates for transportation be exacted, and in determining what is just and reasonable it has always been recognized that, among other factors, not only the cost of service, but its value to the user, must be considered. In the exercise of our power to prescribe such rates, however, we are now required by Section 15a to initiate, modify, establish, or adjust rates (as that term is defined in the section) so that carriers as a whole or in designated rate groups will, under proper standards of operation, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair re-

turn upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. ***

"The purpose of section 15a was undoubtedly to better stabilize the credit of railroads, reassure investors, and attract capital to the railroad industry. *It is plainly our duty to do everything in our power to carry out this purpose.* The experience of the past 12 months, however, has shown the limitations which surround in actual practice the operation of the provision of the law. *** The rate adjustment can not with advantage be made dependent upon fluctuations in traffic.

It is also to be noted that *the duty cast upon us by section 15a is a continuing duty and looks to the future. It does not constitute a guaranty to the carriers,* nor is the obligation cumulative. We are not restricted by past or present statistics of operation and earnings. These are serviceable only as they illuminate the future. *What is contemplated by the law is that in this exercise of our rate-making power the result shall reflect our best judgment as to the basis which may reasonably be expected for the future to yield the prescribed return.*" (Italics Ours)

Reduced Rates, 1922, 68 I. C. C. 676, 730;

"Our function under the law is not that of mere computers and can not thus be atrophied. The duty to prescribe rates for the future carries with it the obligation to exercise an informed judgment upon all pertinent facts, present and past, in order to forecast the future as best we may. *** *'The duty cast upon us by section 15a is a continuing duty and looks to the future. It does not constitute a guaranty to the carriers, nor is the obligation cumulative'.*" (Italics ours)

It will be noted that in the first case cited, which was the first in which the Commission construed Section 15a,

the Commission said that Section 15a was "not a guaranty," and that these same words were repeated in *Reduced Rates, 1922.* In each case, however, the utterance was in connection with such a discussion of the Commission's duty under Section 15a as aids the construction of its utterance in its report in the grain case to the effect that it construes the section "to permit, but not to guarantee, the carriers to earn 5.75 percent."

The Commission in these early cases declared that under the Act it was the Commission's duty to do *everything in its power to enable the purpose of Section 15a to be accomplished,* but that Section 1 required "that no more than just and reasonable rates for transportation be exacted." In other words, the section "permits" the carriers (through the requirement it lays upon the Commission) to receive *reasonable maximum rates upon all traffic, to the end that they may earn the Section 15a return,*—but no more than such rates. This is the meaning of what the Commission said touching the same matter in its report in the grain case.

Rates and Charges on Grain and Grain Products, 91 I. C. C. 105. In this case the Commission, negativing a claim that the rates under consideration should be reduced without consideration of whether carriers were making the return fixed as fair under Section 15a, after referring to language which had been quoted from the *Dayton-Goose Creek Case,* at page 155 of its report, said;

> "This does not forbid us to consider the net return of the carriers but merely says that we need not when considering a particular rate or class of rates. The matter is for our sound discretion. Nor does it limit or qualify our duty under the above-quoted provision of section 15a. If the reduction in the particular rate or class of rates has no substantial effect upon the aggregate carrier revenue there may be no occasion for considering the latter duty. If, on the other hand, it has a substantial effect upon the aggregate revenue, such occasion arises."

"The general policy of the law is thus stated by the court in the same decision:

> 'The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission *** by fixing adequate rates for interstate commerce, *** to secure a fair return upon the properties of the carriers engaged.'

> "But even if Congress had not thus announced a fixed policy, being public utilities they are entitled as individual entities to receive from all their rates, revenues sufficient to pay expenses and a reasonable return upon the value of their properties, economically and efficiently managed, if obtainable through rate schedules not inherently unjust."

Rate Structure Investigation, No. 17,000, Part 2, Western Trunk-Line Class Rates, 164 I. C. C. 1. The Commission's decision in this case was handed down on May, 6, 1930, approximately two months before the Commission's decision in the grain case. The report discloses that the Commission in prescribing class rates in that proceeding gave careful consideration to the amount by which carriers' revenues fell short of the Section 15a return, and that it prescribed class rates which were designed to yield a higher percentage of profit than the carriers traffic generally for the purpose of making up the shortage shown, so far as that could be justly made up by an increase of class rates. Having considered indicated shortage the Commission, at page 181 of its report, said:

"There may be a divergence of opinion as to the amount of additional revenues to which these respondents are reasonably entitled. It may be observed that w.t.l. territory does not compose a group for computing a fair rate of return on carriers' property therein within the meaning of the act. *It is clear that the revenues obtainable from the increases in class rates herein authorized will not augment the earnings sufficiently to produce a fair return upon the carriers' property in the western group as a whole.* There is *a limit to the maximum reasonableness* of class rates if traffic thereunder is to move freely. Class-rate traffic is of such a nature that it may well be expected to *sustain rates relatively higher than other business,* giving due regard to the rate levels in adjoining territories and to *what the traffic will bear.* It comprises articles of high grade, especially the carload movement of which the great bulk consists of articles rated class 5 or higher. *** An increase averaging about 10 per cent through w.t.l. territory, which of course would mean a considerably higher percentage in some States in the eastern half of the territory, would probably bring up the intrastate rates to the level of the interstate rates, but that would yield only about $2,450,000 per year, or *a sum wholly inadequate for respondents' additional revenue needs,* especially in view of the reductions required in the interterritorial combination rates. *** *The rates prescribed herein are intended to be sufficiently high to yield a relatively greater amount of profit than class-rate traffic now contributes to the revenues of w.t.l. respondents.*" (Italics ours)

The increases in rates made in this single case, covering only that part of the Western District which is embraced within Western Trunk-Line Territory, was estimated by the Commission to produce from 10 to 12 million dollars per year additional revenues. (Rec. 534).

Ex Parte 103, 178 I. C. C. 539. This is the so-called *Fifteen Percent Case*, decided by the Commission on October 16, 1931. In its report the Commission discussed the requirements of Section 15a at page 561, as follows:

"Because of the provisions of section 15a, it is contended that rates, otherwise reasonable, perforce become unreasonably low if the general schedule of rates, of which they are a part, produces revenues which in the aggregate fail to attain the results contemplated by the section. Quoting from the carriers' brief, 'It is thus apparent that in any case involving the reasonableness of an increase or decrease in the general rate level, the revenue consideration is paramount and controlling.' Quoting again, it is said 'that the use of the expression 'just and reasonable rates'' in section 15a connotes a different meaning from its use elsewhere and recognizes the paramount financial consideration.' It is urged that the section is superimposed upon the power to prescribe just and reasonable rates in such a way that if the effect of the exercise of that power is to bring the revenues above or below the statutory level, adjustments of earnings to that level must be made by us through other changes in rates. The words 'as nearly as may be' in paragraph (2), according to this view, introduce no discretionary factor, but merely cover the mathematical impossibility of attaining the prescribed standard precisely.

"In support of this view the carriers rely chiefly upon *Dayton-Goose Creek Ry.* v. *U. S.*, 263 U. S. 456. ***

"Up to a certain point we do not differ with the carriers' interpretation of the law. We agree that our duty with respect to fixing just and reasonable rates was changed by Congress in the act of 1920, through the provision of a modified standard for our guidance. We agree that there was then introduced

into the law a new element of protection for the carriers in the public interest, a protection particularly of the credit essential to the preservation of an adequate national system of transportation. We believe that it is our duty under the Congressional mandate to exercise our powers in every reasonable and practicable way to the promotion of that end.

"But there is more than this to be said, if our full duty is to be made clear. *** Assuming that the paramount purpose of that section is the provision of adequate revenue for the carriers, it is the *actual revenue result* of a proposed increase in rates which we must have in mind, and not the effect apparent superficially. ***

"Nor is this all. In *Smyth* v. *Ames*, 169 U. S. 466, 547, the court said:

> 'What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services performed by it are reasonably worth.' This principle has repeatedly been affirmed by the Supreme Court. ***

"We do not understand that Congress, even if it be assumed that it could lawfully have done so, attempted in section 15a to override or discard this basic principle of the law, or that there is anything in the decisions of the Supreme Court which indicates that such a result has been accomplished. ***

"We agree with the carriers that prior to section 15a the revenue needs which we were bound to consider were those of individual carriers, although as a practical matter we have long considered all competing lines and not merely that line which can handle the business cheapest in determining the reasonableness of rates. *Receivers and Shippers Asso.* v.

C., N. O. & T. P. Ry. Co., 18 I. C. C. 440. Thereafter the standard was changed by Congress so that now we are bound to consider instead the revenue needs of the carriers in the aggregate or by groups, and *such needs were brought into the foreground and emphasized. In every reasonable and practicable way we must recognize those needs and protect the general credit of the carriers.* The direction to maintain an adequate system of transportation was reaffirmed by Congress in the Hoch-Smith Resolution in 1925, U. S. Code, T. 49, sec. 55. (Italics ours)

"But Section 15a has not, in our opinion, made revenue needs the 'paramount and controlling' factor in the determination of a reasonable general level of rates. Factors which theretofore were relevant and entitled to consideration, notwithstanding the revenue needs of individual carriers, are still relevant and entitled to consideration, notwithstanding the revenue needs of the carriers in the aggregate or by groups."

We maintain that the construction thus placed upon Section 15a by the Commission in *Ex Parte 103* was in substance the same as that which the carriers urge in their brief in the instant case, and in substance the same as the Commission has uniformly placed upon the section since it was first enacted.

Viewed in the light of this continuous construction, and of the use of phrases which in the course of such construction had been used, what the Commission said in the grain rate report is not open to any other construction than one which accords with what it had said respecting its duty under Section 15a in other reports. It did not, in the grain rate report, discuss its duty with elaboration, but what it said was plain. We quote briefly:

"The question here presented is whether, under present conditions, the rates on grain and grain

products throughout the western district are reasonable and just and are properly related to each other and to the rates on other traffic. The answer must take into account not only comparisons of distance, transportation conditions, and ton-mile and car-mile earnings on grain and other commodities, but also whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by law, including section 15a of the interstate commerce act. ***

"The percentage rates of return of Class I carriers in the western district, by regions, for the calendar years 1921-28 were as follows: *** During the seven years after the termination of Federal control these roads were short $189,775,069 of making a 5.75 per cent return on property investment and $136,265,151 short of that return on our valuation. In the year 1927 the corresponding shortage was $12,758,736 on our valuation. (Page 627) ***

"We find that the present rates on wheat and coarse grains and their products are unreasonable and unduly preferential and prejudicial to the extent they exceed the rates prescribed in Appendix D. (Page 661) ***

"The action here taken represents the fullest possible response to all the mandates of the law affecting, among other things, the important subjects of levels and relations of rates, the natural and proper development of the country as a whole, and the maintenance of an adequate system of transportation. The future volume of movement of wheat and other grains between specific points can not be accurately known. It follows that the revenue effects of the increases and decreases which will follow the effectiveness of our action herein can not be precisely stated. We have made many different checks and estimates. While the reductions far exceed the increases, and the corresponding revenue effects will

be substantial, the full effect upon revenues can not be adequately foretold, in view of the limitations upon transit, the elimination of transit balances outbound from primary markets, and the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates. We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation. We say this especially in the light of increased revenues already granted in certain other cases, and in the realization that a failure of the present revision to afford adequate revenues will prompt further proceedings." (Page 697)

We make the following further comments only:

The Commission at the outset stated that it must consider not only transportation conditions, and the ton-mile and car-mile earnings on grain and other commodities, and whether under present conditions the rates on grain and grain products are reasonable and just and properly related to each other and to the rates on other traffic, but also "whether *the general level of rates on all traffic* as a whole is sufficiently high to accord the carriers the *rate of return contemplated by law, including section 15a.*"

Obviously, the purpose of considering the last factor, was so that the rates which the Commission should prescribe on grain and grain products should be placed at a level *to yield their proper share of the fair return required by the carriers under Section 15a,* and so that they *might be properly related to rates on other commodities* fixed to yield *their fair share of such return.* There could be no other purpose in its consideration.

Finally, in its concluding general comment, on page 697 (Rec. 147), from which we have quoted, the Commission asserted that the action taken by the order "represents the *fullest possible* response to *all* the mandates of the law affecting, among other things, the important sub-

jects of levels, *** and the maintenance of an adequate system of transportation."

Quoting this language on page 112 of their brief, the appellants, from the fact that the Commission found that the readjustment "will not threaten the maintenance of an adequate system of transportation," draw the conclusion that the Commission considered itself, as to rates on agricultural products affected by depression, "relieved of its duty to give effect to the requirements of Section 15a" when that finding could be made.

The appellants rest this conclusion on the following reasoning.

They say, at page 113 of their brief:

> "The words 'the maintenance of an adequate system of transportation' employed by the Commission in both cases were lifted bodily from the third paragraph of the Hoch-Smith Resolution."

They point out that in its report in the California deciduous fruit rate case the Commission made a like finding, saying:

> "It seems clear that the reduction requested, if granted, would not affect the maintenance of adequate transportation service."

They then quote from this Court's opinion in the *Ann Arbor case* setting the Commission's order aside, and thereupon state their conclusion as follows:

> "In this case as in that case the Commission was thus proceeding on the erroneous assumption that it was empowered, if not directed, to reduce the rates on agricultural products affected by the depression, notwithstanding, as appears from the report in this case and as was stated in the report in that case, that the carriers' rate of return was below that contemplated by Section 15a, provided only the Com-

mission was of the opinion that the reductions required would not threaten the maintenance of an adequate system of transportation."

The language of the report declares the fullest possible response to all the mandates of the law. This was the equivalent of a declaration that the Commission had placed the rates covered by its order at the highest level consistent with the standards prescribed by the Interstate Commerce Act.

It should be remembered that the "maintenance of an adequate system of transportation" was the purpose which underlay the Transportation Act and Section 15a, and that the Hoch-Smith Resolution reaffirmed that purpose. Accordingly, the use of those words in connection with a declaration of the Commission's compliance with Section 15a can not be taken to negative what the Commission said, and to carry the implication that the Commission proceeded under some construction of the Hoch-Smith Resolution incompatible with the continuing requirements of the Interstate Commerce Act.

(d) The True Construction of Section 15a.

To this point in this section of our brief we have accepted the appellants' construction of Section 15a; and we have pointed out that the Commission appears to have applied to that section a like construction. If that be true, then no matter whether the construction be a true construction or an erroneous construction, the appellants have no occasion for complaint, since it is the most favorable construction for the appellants which could be given it.

Our acceptance of that construction, however, has been for the purposes of argument only. We believe the construction to be plainly erroneous. We shall now examine the question further, and the applicable decisions of this Court, for the purpose of discovering, if we can, the true construction of Section 15a.

The situation which led to the enactment of Section 15a is described at page 89 of the appellants' brief. The Fifth and Fourteenth Amendments, restrained the Federal and State Governments, respectively, from imposing upon any railroad an unreasonably low schedule of rates, whereby such railroad was prevented from receiving sufficient compensation for its services to pay the cost of operation and a fair return upon the value of its property devoted to rendition of those services.

Theoretically the Constitution thus protected each railroad against the imposition by public authority of rates so unreasonably low as not to afford a fair return. Due to the competitive relationship of the railroads, however, it did not in fact afford that protection in all cases. By restriction of the rates upon any railroad of a competitive group the rates of all competing roads could be in effect restricted irrespective of their values and their earnings, because, unless such competitors met the rates of the restricted carrier, traffic between all competitive points would be lost to that carrier. Hence, as a practical matter, the constitutional rule could be invoked by competing roads only when they were severally able to make a showing of confiscation. Hence poorly located roads, with restricted traffic, were compelled to meet such rates as might be imposed upon their most fortunately located and strongest competitors, without regard to the effect upon their own earnings. This was the mischief which Section 15a was enacted to cure.

By Section 15a Congress provided for group rate-making. This was a device whereby all roads in any rate group should enjoy collectively, by virtue of the provisions of the section, a right similar to the right theretofore enjoyed by the several roads of the group individually, by virtue of the Constitution.

Section 15a further aimed to assure adequacy, and a certain degree of stability and certainty, as to the percentage of return which should be considered fair by the regulatory agency. Instead of leaving that percentage

to be fixed by the Commission each time the question might be before the Commission in a rate case, paragraph (3) of the section provided "The Commission shall from time to time determine and make public what percentage *** constitutes a fair return", and "such percentage shall be uniform for all rate groups." The paragraph also provided that in making this determination the Commission should "give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation."

The reason for enactment of the section was declared in paragraph (5). That purpose was to enable the Commission "to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation."

It was recognized that the establishment of uniform rates would enable some carriers to receive income "substantially and unreasonably in excess of a fair return on the value of their railway property", and the recapture provision was accordingly provided.

By paragraph (2) of the section the Commission was directed as follows:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return

upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

These are the features of the directions given to the Commission in paragraph (2), in the order in which given:

(1) The Commission is to act only in the exercise of its existing power to prescribe just and reasonable rates;

(2) The Commission is to establish rates "so that carriers as a whole *** will *** earn *** as nearly as may be, to a fair return upon the aggregate value" of their properties;

(3) But this shall be only under "honest, efficient and economical management, and reasonable expenditures for maintenance."

The first and the final directions were designed to insure rates reasonable to the public.

It seems patent that the prime purpose of Section 15a was to place the stamp of Congressional approval upon the consideration of carriers in groups, in the making of competitive rates, and upon the determination of the reasonableness or unreasonableness of the levels of such rates upon consideration of the aggregate return upon the aggregate of the values of the properties of all such carriers in place of consideration of individual carrier returns and individual carrier values.

This cures the mischief that Section 15a was enacted to remedy. It is the object declared in paragraph (5) of the section. It is in accord with the language of Section 15a.

The carriers have not been content with the advantages the Act plainly gives to them. They have demanded more. In the grain rate case before the Commission, and

in the Court below, they have made fantastic claims, as witness the Commission's decision in *Ex Parte 103*, hereinbefore quoted in this brief.

In this Court in this case their claims are more moderate, but we think go beyond the plain intent of Section 15a. What is that intent?

Aside from the recapture provision, and the provision as to the determination and publication of the percentage rate for the fair return to be earned, and the factors to be considered in determining that rate, Section 15a provides only for the substitution of an aggregate rate base, and the consideration in connection therewith of the aggregate return of all the carriers in a group in place of individual rate bases and individual returns.

What Section 15a does is to authorize and direct the Commission in making rates for any rate group to proceed exactly as if all the roads in that group were held by a single owner, and, so far as a fair return is concerned, to aim to produce, as nearly as may be, a fair return from the aggregate earnings of all such roads, upon the aggregate value of all, equal to the percentage which has been fixed under paragraph (3) of the section.

Too much significance has been attached by the carriers,—and perhaps by the Commission,—to the fact that paragraph (2) provides "In the exercise of its power *** the Commission *shall* *** establish *** rates so that carriers as a whole *** will *** earn *** a fair return upon the aggregate value" of their properties. Emphasis is laid upon the word "shall", whereas it should be laid upon the words "as a whole" and "aggregate value."

The direction goes to the establishment of rates which shall yield an aggregate fair return on the aggregate value of all roads rather than individual fair returns on the values of individual roads. It is, notwithstanding, a direction to establish rates to yield the prescribed aggregate return, but it does not rise above the requirement of the Constitution, applicable in the absence of the statute, that in the exercise of its power to prescribe just and

reasonable rates the Commission shall so establish such rates that each carrier will earn a fair return upon the value of its own property.

To the mandate of the statute the Commission owes the same obedience as, before the statute was enacted, it owed to the mandate of the Constitution, with respect to individual returns. It must aim to establish rates which will yield the fair return which has been fixed under the section. In fixing rates to provide that return, it is to consider exactly the same factors or standards of reasonableness as it formerly used in fixing just and reasonable rates, with these exceptions only:—that before Section 15a was enacted in each rate case, so far as value and return on value were concerned, it gave consideration to individual road value and individual return thereon, and aimed to provide such rate of return as in the particular case before it appeared to be fair, whereas now, whenever it fixes rates, so far as value and return on value are considered, it is required to have in mind the aggregate value of all roads and aggregate return thereon, and at the uniform rate which has been prescribed under paragraph (3).

Such is the rule of rate-making prescribed by Section 15a, and, to the same extent that the constitutional fair value rule applied in the case of individual roads before Section 15a was enacted, this rule applies in every sort of rate case wherein the Commission is called upon to initiate, modify, establish, or in any way adjust or regulate the amount which carriers shall receive for their transportation services.

(c) The Opinions of This Court in Which Section 15a Has Been Construed or Discussed.

An examination of the several opinions of this Court in which Section 15a has been construed or discussed will confirm the construction which we have here presented.

The first of these cases was *Wisconsin Railroad Commission* v. *C. B. & Q. R. Co.*, 257 U. S. 563, 585. The Court in its opinion, referring to Section 15a, said:

> "The latter, the most novel and most important feature of the act, requires the Commission so to prescribe rates as to enable the carriers *as a whole*, or in groups selected by the Commission, to earn an *aggregate annual net railway operating income equal* to a fair return on *the aggregate value* of the railway property used in transportation. ***
>
> "The new measure imposed an affirmative duty on the Interstate Commerce Commission to *fix rates* and to take *other important steps* to maintain an adequate railway service for the people of the United States. This is expressly declared in Sec. 15a to be one of the purposes of the bill." (Italics ours)

In *New England Divisions Case*, 261 U. S. 184, 189, the Court discussed the general purpose of Transportation Act, 1920, as follows:

> "Transportation Act 1920 introduced into the Federal legislation a new railroad policy. *** Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to insure, also, adequate transportation service. *** And to attain it, new rights, new obligations, new machinery, were created. The new provisions took in a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. *** By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible unless additional revenues were procured. A general rate increase alone would not meet the situation. There

was a limit to what the traffic would bear. A 5 per cent increase had been granted in 1914 (Five Per Cent Case, 31 Inters. Com. Rep. 351; 32 Inters. Com. Rep. 325); 15 per cent in 1917 (Fifteen Per Cent Case, 45 Inters. Com. Rep. 303); 25 per cent in 1918 (General Order of Director General, No. 28). Moreover, it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines) if thereby prosperous competitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. It was necessary *to avoid unduly burdensome rate increases* and yet *secure revenues adequate to satisfy the needs of the weak carriers.* To accomplish this two new devices were adopted: the *group system of rate making* and the *division of joint rates* in the public interest." (Italics ours)

Dayton-Goose Creek Railway v. *United States,* 263 U. S. 456, 478, was the next case. This was a suit brought to restrain the Commission from enforcing the recapture provision of Section 15a against the plaintiff. In its opinion the Court enlarged upon the illuminating discussion contained in the *New England Divisions Case.* Referring to that case, and to the *Wisconsin Case,* the Court said:

"In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It *aims to give* the owners of the railways *an opportunity to earn*

enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and, in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

"It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that, when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect, and control. ***

"Title 4 of the Transportation Act, embracing Secs. 418 and 422, is carefully framed to achieve its expressly declared objects. *Uniform rates enjoined for all shippers* will tend to divide the business in proper proportion so that when the burden is great, the railroad of each carrier will be used to its capacity. If the weaker roads were permitted to charge higher rates than their competitors, *the business would seek the stronger roads with the lower rates,* and congestion would follow. The *directions given to the Commission in fixing uniform rates* will tend to put them on a scale enabling a railroad of average efficiency among all the carriers of the section to earn the prescribed maximum return. *** By the recapture clauses Congress is enabled to maintain uniform rates for all shippers and yet keep the net

returns of railways, whether strong or weak, to the varying percentages which are fair respectively for them. The recapture clauses are thus the key provision of the whole plan.

"Having regard to the property rights of the carriers and the interest of the shipping public, the validity of the plan depends on two propositions.

"*First.* Rates which, as a body, enable all the railroads necessary to do the business of a rate territory or section to enjoy not more than a fair net operating income on the aggregate value of their properties therein economically and efficiently operated, are *reasonable from the standpoint of the individual shipper in that section.* He, with every other shipper similarly situated in the same section, is vitally interested in having a system which can do all the business offered. *** This conclusion makes it unnecessary to discuss the question mooted, whether shippers are deprived of constitutional rights when denied reasonable rates.

"It should be noted that, in reaching a conclusion upon this first proposition, we are only considering the general level of rates and their direct bearing upon the net return of the entire group. The statute does not require that the net return from all the rates shall affect the reasonableness of a particular rate or a class of rates. In such an inquiry, the Commission may have regard to the service done, its intrinsic cost, or a comparison of it with other rates, and need not consider the total net return at all. ***

"*Second.* The carrier owning and operating a railroad, however strong financially, however economical in its facilities, or favorably situated as to traffic, *is not entitled, as of constitutional right,* to more than a fair net operating income *upon the value of its properties* which are being devoted to transportation. ***

"The reduction of the net operating return provided by the recapture clause is, as near as may be,

the same thing as if rates had all been reduced proportionately before collection. It is clearly unsound to say that the net operating profit accruing from a whole rate structure is not relevant evidence in determining whether the sum of the rates is fair. *** If the profit is excessive, the sum of the rates is so. One obvious way to make the sum of the rates reasonable, so far as the carrier is concerned, is to reduce its profit to what is fair. ***

"It is then objected that the government has no right to retain one half of the excess, since, if it does not belong to the carrier, it belongs to the shippers, and should be returned to them. If it were valid, it is an objection which the carrier cannot be heard to make. It would be soon enough to consider such a claim when made by the shipper. But it is not valid. The rates are reasonable from the standpoint of the shipper, as we have shown, though their net product furnishes more than a fair return for the carrier. The excess caused by the discrepancy between the standard of reasonableness for the shipper and that for the carrier, due to the necessity of maintaining uniform rates to be charged the shippers, may properly be appropriated by the government for public uses because the appropriation takes away nothing which equitably belongs either to the shipper or to the carrier." (Italics ours)

This case has been much relied upon by the appellants as establishing the law to be, since Section 15a was enacted, that rates are necessarily unreasonably low if they are not producing the aggregate return on aggregate value contemplated by that section. They emphasize the words:

"Rates which, as a body, enable all the railroads necessary to do the business of a rate territory or section to enjoy not more than a fair net operating income on the aggregate value of their properties therein economically and efficiently operated, are reasonable from the standpoint of the individual shipper in that section."

It may be noted that this language is in the nature of a *dictum*. No shipper was before the Court, and no shipper's right was in litigation. More important, however, is the fact that the language was not directed towards establishing aggregate return on aggregate value as the sole test of reasonableness. Whether it was or not such a test was not under consideration by the Court.

The situation is clear. The carrier denied the constitutionality of Section 15a. The Court in effect stated that the validity of the provision could be established only by showing that the rates which the carrier had received were unreasonable as to it while reasonable as to shippers. The discussion in the opinion was directed towards establishing those two propositions. The Court said that Congress had by Section 15a established two standards of reasonableness,—one for the shipper and one for the carrier. Dealing first with the shipper, the Court showed that he could not complain of deprivation of a constitutional right because the rates were reasonable as to him, and turning then to the carrier, the Court showed that it had no ground to make constitutional objection, for the reason that it was entitled to a fair return upon its own property, and no more.

The appellants have made the mistake of concentrating their attention upon a single portion of the Transportation Act (Section 15a), and of treating language used by the Court with respect to the whole Act as if limited in its application to Section 15a. At page 92 of their brief in this case they quote from *New England Divisions Case*, citing also the *Dayton-Goose Creek Case*, and comment thereon as follows:

> "In the *New England Divisions Case*, 261 U. S. 184, 189, the Court said:
>
> 'Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 585. There-

tofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission, new powers were conferred and new duties were imposed.'

To the same effect are: *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 478, and *New York* v. *United States*, 257 U. S. 591, 602.

"The purpose and effect of Section 15a was, therefore, to substitute for the old system of regulation, under which the railroads, as a whole, were permitted to earn a fair return out of the aggregate of separately established rates, if sufficiently high for the purpose, a new rule of rate-making designed to insure such a return and to impose upon the Commission the affirmative duty so to adjust rates as to accomplish such result.

"Although the purpose was to provide for the maintenance of an adequate transportation system, Congress did not leave to the determination of the Commission either the standard by which the attainment of this object was to be achieved, or the means of its attainment. It itself provided the standard by requiring that the rates should be such as to provide, as nearly as might be, a fair return upon the aggregate value of railway property, and the means of its realization by directing the Commission so to adjust the rates."

It is plain, however, from the opinions of the Court which the appellants rely upon and cite to support their construction, that the Court, when speaking of provisions "especially designed to secure a fair return on capital devoted to transportation service" was referring no more to Section 15a than to other important provisions of Transportation Act.

A foot-note to the sentence which contains that phrase in the *New England Divisions* opinion states some of those provisions as follows:

> "'Section 422, pp. 488, 489. To this end, also, the Commission was empowered, among other things, to permit pooling of traffic or earnings, Sec. 407, pp. 480, 481; to authorize abandonment of unprofitable and unnecessary lines, Sec. 402, p. 477; *Texas* v. *Eastern Texas R. Co.*, 258 U. S. 204, 66 L. ed. 566, 42 Sup. Ct. Rep. 261; to fix minimum, as well as maximum, rates, and thus prevent cut-throat competition and the taking away of traffic from weaker competitors, Sec. 418, p. 485; to prevent the depletion of interstate revenues by discriminating intrastate rates, *Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 66 L. ed. 371, 22 A. L. R. 1086, 42 Sup. Ct. Rep. 232; *New York* v. *United States*, 257 U. S. 591, 66 L. ed. 385, 42 Sup. Ct. Rep. 239; and to determine the division of joint rates."

The substance of this foot-note is also carried into the text of the opinion in the *Dayton-Goose Creek Case*, in language which we have quoted.

In none of the opinions of this Court in which Section 15a has been discussed can any language be found which, if read in proper relation to the other language of the report in which it appears, can be taken to indicate that Section 15a, in the opinion of the Court, was designed to place upon the Commission any requirement other than (1) to determine and publish the percentage of aggre-

gate value which constitutes a fair return thereon, giving consideration to the factors directed in paragraph (3); (2) to fix aggregate value of railway property for the country as a whole, or for such rate groups as it may divide the country into; (3) when acting upon rates to be thereafter imposed, to give consideration to such aggregate value and to the aggregate return thereon as factors affecting the reasonableness of rates to be fixed to the same extent and in the same way that it formerly considered individual value and individual return; (4) to consider the percentage return fixed under Section 15a as representing the fair return which the carriers should be permitted to earn, and to aim to establish rates to produce that return in the same way that it would aim to establish rates which would yield the constitutional fair return for an individual road, if Section 15a had never been enacted; and (5) finally, to recover and administer excess earnings as provided in the section. There is no other or further requirement.

3. THE COMMISSION DID NOT CONSIDER MATTERS OUTSIDE THE RECORD.

In their brief at pages 149-151, the appellants quote from the Commission's report and comment thereon as follows:

> "'The future volume of movement of wheat and other grains between specific points can not be accurately known. It follows that the revenue effects of the increases and decreases which will follow the effectiveness of our action herein can not be precisely stated. We have made many different *checks and estimates*. While the reductions far exceed the increases, and the corresponding revenue effects will be substantial, the full effect upon revenues can not be adequately foretold, in view of the limitations upon transit, the elimination of transit balances outbound from primary

markets, and the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates. We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation. We say this especially in the light of *increased revenues already granted in certain* other cases, and in the realization that a failure of the present revision to afford adequate revenues will prompt further proceedings.' (Italics Appellants) ***

"Its (the Commission's) findings that these reductions would not, however, threaten the maintenance of an adequate system of transportation was based upon (1) certain checks and estimates of the revenue effects of the action to be taken, and (2) the effect of action taken in certain other cases in increasing revenues. *** This was clearly a finding of fact upon a material issue and as such required to be based upon evidence. The carriers were entitled to an opportunity to be confronted with both sets of estimates, to check them, to cross-examine their makers and to offer evidence in rebuttal.

"It is alleged in the bill that none of the evidence of estimates relied on was of record in the case (R. 31-2). ***

"Moreover, checks and estimates of losses resulting from the order could not possibly have been in the record for they were checks and estimates of the revenue effects of the order itself, which could not have been determined—even approximately—prior to its rendition."

As to the matter of "checks and estimates", it is perfectly apparent from the Commission's report that these were made by the Commission itself in the course of its consideration of the case. The claim that the consideration of them renders the Commission's order void must

rest upon one or the other of the following contentions, (1) that the Commission in any rate proceeding must take the carriers to the conference table, and submit its working figures, necessary to a decision of the case, to them, or (2) that the Commission must prescribe rate scales without making any check or estimate as to the effect which they will have upon the carriers' revenues.

We do not consider it necessary to make argument to negative either of these propositions.

(a) The Consideration of Increases to be Derived from Advances in Rates on Other Commodities.

The appellants further say:

> "In so far as the effect of the supposed increases from other cases is concerned it appears from the concurring opinion of Commissioner Woodlock that chief among these cases was the so-called *Class Rates case* (R. 187) (*Western Trunk-Line Class Rates*, 164 I. C. C. 1). This case was decided long after the close of the record in the present case (R. 533). ***
>
> "The order of the Commission is thus predicated upon a balancing of estimated decreases, on the one hand, and estimated increases, on the other, neither of which were of record and neither of which the carriers ever had any opportunity to examine or correct."

This complaint disregards the nature of the proceeding in which the Commission was acting. The grain rate investigation was but a part of the general *Rate Structure Investigation*, No. 17,000, covering all of the appellants' rates for application on every description of traffic.

It would clearly be impossible to accomplish the purpose of the resolution under which that investigation was carried on, which was to bring the rates on every de-

scription of traffic into proper relation to each other, preserving, however, to the carriers revenues sufficient for the maintenance of an adequate transportation system, without giving consideration to increases in revenues which would result from advances upon other classes of traffic, when fixing rates for a particular class of traffic.

We shall make further reference to this point in the appellants' argument in the concluding paragraph of this brief. We here point out, however, that when arguing other points in their brief the appellants recognized the true character of the grain rate inquiry, and that the Commission should take into account the revenues to be derived from other classes of traffic, when fixing rates on grain and grain products (See pages 79, 80, 111 and 121 of appellants' brief).

In their brief in the court below the appellants also complained that the Commission's report contains a tabulation showing the carriers' return for the full year 1928, when the taking of evidence closed before the end of the year. The correctness of the return as thus stated was not questioned, but it was urged that evidence concerning it could not have been in the record, and that hence, under the rule laid down in *United States v. Abilene & Southern Railway*, 265 U. S. 274, the order must be set aside. There is no merit in that claim.

In the *Abilene & Southern Case* the opinion of the Court states that "objection to the use of the reports (which were not in the record) was seasonably made by the carriers and insisted upon." Here the tabulation complained of, exactly as it appears in the Commission's report, was set forth in the tentative report of the examiners, which was duly served on the appellants April 20, 1928, with opportunity for the filing of exceptions. They filed exceptions, and were heard in oral argument, but they made no objection to the consideration of the 1928 returns. Under these circumstances, they can not complain now. This assignment of error has not been argued in their brief here, and we assume has been abandoned.

4. THE ACTION OF THE COMMISSION WAS NOT ARBITRARY.

At page 155 of their brief the appellants, referring to the denial by the Commission of their petitions for rehearing, say:

> "Whether the order as originally made was valid or not, the Commission in refusing to rehear and consider, to take the evidence offered in respect of changed conditions alleged, in addition to acting arbitrarily and unreasonably, plainly failed to discharge the duty imposed upon it by Sec. 15a."

The carriers have no right to a hearing before the Commission except as the same is secured to them by the Interstate Commerce Act. The Commission is an agency of Congress which has been granted powers from Congress to determine and prescribe those rates which conform to the standards established by the Congress in the Interstate Commerce Act. When the Commission, exercising its delegated power, in the manner directed by Congress, by order prescribes rates for any carrier or carriers subject to its jurisdiction, that order is, as to all intents and purposes, a law of Congress, and can be changed only by Congress or in the manner which Congress has provided.

If Congress had by statute prescribed the rates which this order of the Commission prescribes, the carriers could have resisted those rates in court only upon the ground of their constitutional insufficiency,—a ground which is not alleged here. It could not have resisted them upon the ground that it had applied to the Congress or to the Commission to change them and without success.

If Congress had chosen to do so, it might have limited the power of its agency, the Commission, to the making of rate orders, as an initial proposition, with the provision that those orders, once made, should be subject to

change thereafter by act of Congress only. If it had so provided, and this order had been made in the exercise of such limited power, the carriers could have resisted it only upon the ground that the Commission had not pursued its authority regularly, or that it had acted arbitrarily *in the making of the order*. If the order was valid when made, they could not have resisted it upon the ground that on request to change the order the Commission had not changed it. If this order was regularly made the rates prescribed would be the lawful rates notwithstanding changed conditions unless by reason of such changes they should become confiscatory.

The Congress has delegated power to the Commission to prescribe rates, and has given to its orders the effect of law. It has not, however, left those orders beyond the reach of the Commission. It has given the Commission power, within its discretion, to revise, change, or modify its order, in any case, in which, after a rehearing, it finds that there is occasion therefor.

The applicable provision of the statute is as follows:

> "Sec. 16a. That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission *in its discretion* to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Com-

mission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly." (Italics ours)

It will be noted that no *right* to a rehearing, by reason of facts occurring after a hearing is ended, upon the basis of which an order has been entered, is given to any party. The right to a hearing before order is absolute; but after a due process of law hearing has been had, and the Commission's decision declaring the rates which the statute commands has been entered, then *"it shall be lawful"* for the Commission to enter upon a rehearing. Whether it shall do so is *"in its discretion."* If, exercising that discretion, the Commission refuses to reopen the case, the record stands, and the order which has been made, if its validity is challenged, must stand or fall upon that record.

A rate order made to take effect on a fixed date in the future, in legal effect, is like a statute enacted by Congress to become effective at a subsequent date. An application to the Commission to reopen the case, and change the order, is in effect an application to change rates prescribed by law, upon consideration by the Commission of the evidence already of record, together with such additional evidence as may be offered upon the rehearing.

The Commission in its discretion may open the old case, or it may require those who claim that the rates fixed by the outstanding order have become unreasonable, or otherwise unlawful, by reason of changed conditions to institute a new proceeding.

If the Commission denies the application to set aside the order and restore the pre-existing rates, the court can not reverse the Commission, and itself restore the former rates, without exercising a legislative power.

Whether the new facts alleged in the application, considered in conjunction with those shown by the record, make a restoration of the pre-existing rates lawful, or require a modification of the rates prescribed by the outstanding order, depends upon administrative findings which the Commission alone may make.

Congress in the statute has provided, "No such application shall *** operate in any manner to stay or postpone the enforcement (of the Commission's order) *without the special order of the Commission.*" Until such special order is entered the original order stands, prescribing the rates which Congress has commanded shall be in force.

The constitutional guaranty of due process of law does not require that parties to judicial or administrative proceedings shall be given a new trial upon a showing of proper cause therefor.

> "A hearing before judgment, with full opportunity to present all evidence and the arguments which the party deems important, is all that can be adjudged vital. Rehearings, new trials are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect." *Pittsburgh, C. C. & St. L. Railroad Co.* v. *Backus*, 154 U. S. 421, 426.

When Congress in Section 16a of the Interstate Commerce Act empowered the Commission to grant rehearings "in its discretion," it must have used that phrase in its ordinary sense. It meant that the Commission should exercise discretion not subject to review, as do Judges of the federal courts, when passing upon motions for retrials. The federal rule has been stated by this Court as follows:

> "A motion for a new trial in the courts of the United States is addressed to the sound discretion

of the tribunal which tried the case, and to grant or refuse it can not be made the subject of exception." *Schuchardt & Gebhard* v. *Allen et al.*, 68 U. S. 642.

This does not mean that the carriers are without a remedy if the rates are confiscatory. They may apply to the court to enjoin their enforcement, but the inquiry of the court can go no further than to determine whether the order prescribing the rates was valid when entered and whether the rates when sought to be enjoined by the carriers are confiscatory. It can not consider the evidence and act legislatively thereon. *Proctor & Gamble Co.* v. *United States*, 225 U. S. 282.

(a) The Commission's Refusal to Prolong the Proceeding Was in Conformity With the Congressional Direction.

The refusal of the Commission to prolong the proceeding by reopening the same for further hearing as to the effect of the current depression upon the revenues of the carriers or for any other purpose, was in accord with the express direction of Congress contained in the Hoch-Smith Resolution. Farm products were involved. As to such products the concluding paragraph of the resolution directs that the Commission shall proceed "with the least practicable delay." The second paragraph, as to rates generally, directs that the Commission during the progress of the investigation, "as expeditiously as possible" shall make decisions and orders.

The investigation of rates on grain and grain products preliminary to the order had consumed several years. The petitions for further hearing presented facts of common knowledge. If the Commission was of the opinion that, if proved as alleged in the motions they would not afford ground for revoking or modifying the order, it would have been derelict to the duty imposed upon it by the resolution to proceed expeditiously if it had granted the motions.

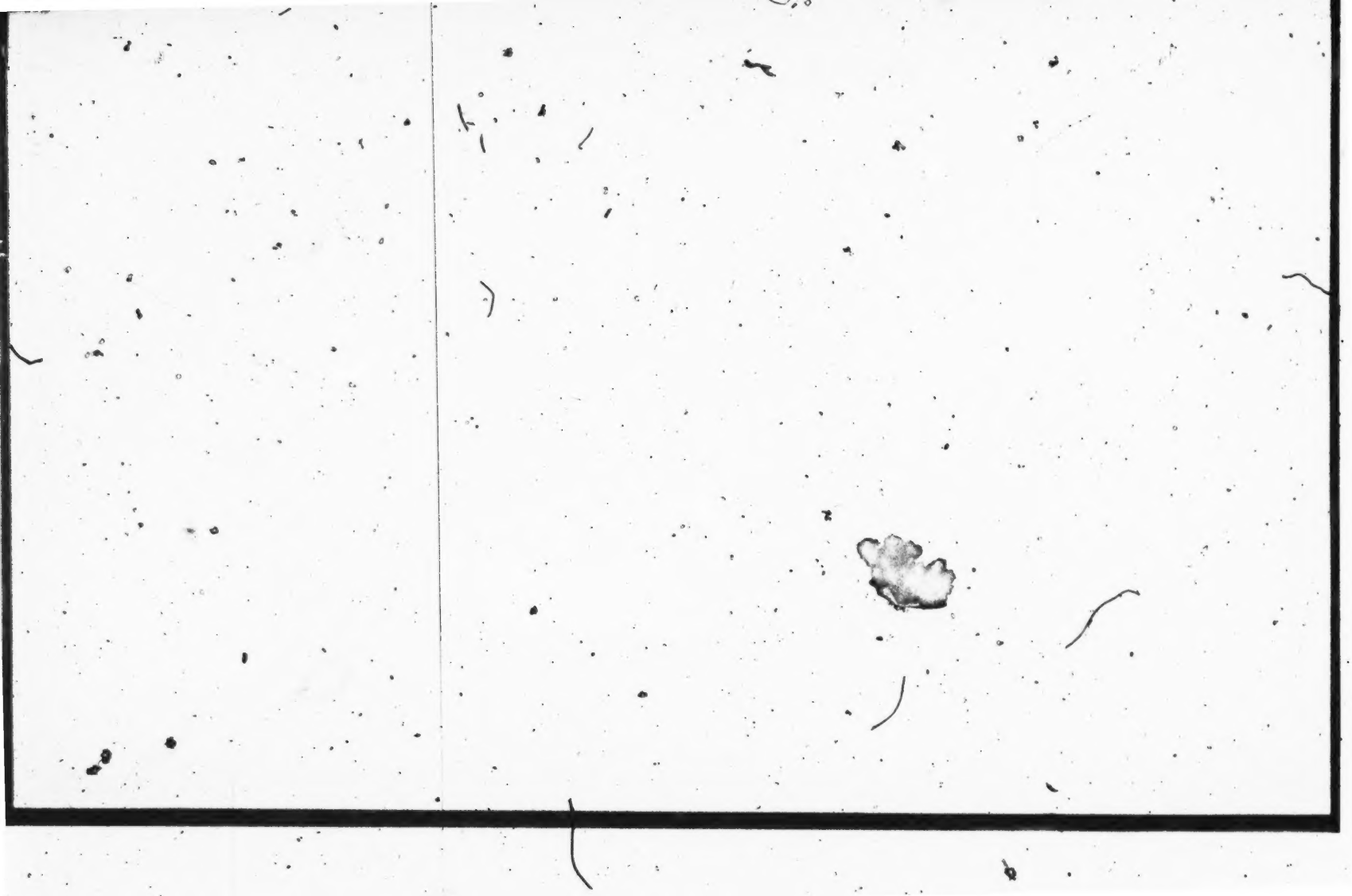
This same injunction of expedition constituted a conclusive reason why the appellants could not be supplied with the copies of the checks and estimates made by the Commission in the course of its study of the record and the preparation of its decision, with opportunity to the appellants for a hearing as to the correctness of the Commission's estimates of the probable effect of rate changes on other classes of traffic.

If that course of procedure were afforded to carriers the Commission never could conclude the revision ordered by the resolution.

The resolution must receive such a construction, and be taken to authorize such procedure, as to make possible the accomplishment of the purpose for which it was enacted. The language following, which this Court used in the *New England Divisions Case*, 261 U. S. 184, 197, is applicable here:

> "Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed ***. The need to be met was urgent. To require (the procedure urged by the carriers) *** would be tantamount to denying the possibility of granting relief."

CLYDE S. BAILEY,
JOHN E. BENTON,
Attorneys for said Interveners.



CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 287.—October Term, 1931.

The Atchison, Topeka and Santa Fe Railway Company, et al., Appellants, *vs.* The United States, The Interstate Commerce Commission, et al.	Appeal from the District Court of the United States for the Northern District of Illinois.

[January 4, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

These suits, which were consolidated, were brought by carriers by railroad in the Western District, and by certain shippers, to restrain the enforcement of an order of the Interstate Commerce Commission made July 1, 1930, as amended by a supplemental order of April 10, 1931. The order prescribed maximum rates for the transportation of grain and grain products on domestic shipments within the Western District[1] and for export, as described, and directed the carriers to desist from certain practices (164 I. C. C. 619; 173 *id.* 511).[2] Other carriers were permitted to intervene as parties petitioners, and state commissions and certain state organizations were admitted as intervening defendants. This appeal is from the order of the District Court, as specially constituted,[2] denying the applications of the petitioners for an interlocutory injunction. 51 F. (2d) 510.

Following the passage of the Joint Resolution of the Congress of January 30, 1925[3] known as the Hoch-Smith Resolution, the Interstate Commerce Commission instituted a general investigation[4] of the rate structures of common carriers to determine

[1]The Western District was defined in the order of July 1, 1930, as that part of continental United States "on and west of the Mississippi River, west of Lakes Superior and Michigan, and west of and including Illinois."

[2]U. S. C., Tit. 28, sec. 47.

[3]C. 120, 43 Stat. 801.

[4]Docket No. 17,000.

whether their rates, charges, regulations and practices were unjust, unreasonable, unjustly discriminatory or unduly preferential, or otherwise in violation of law. The investigation was divided into separate parts, and the proceeding in one of them (Part VII) terminated in the order under review. In connection with this proceeding there were a large number of formal complaints and suspension proceedings which, considered together, brought into issue all phases of the grain rate structure involved in the Commission's general investigation. Many state commissions, chambers of commerce, and trade and traffic associations participated in the proceeding. Hearings were held in many cities and extended over a year. The record was closed on September 22, 1928, and after protracted argument the matter was submitted, on July 1, 1929, to the Commission for its decision. The first report of the Commission, made on July 1, 1930, emphasized the magnitude of its task, in dealing with "three score and more of major issues, affecting every part of a vast territorial domain", and the thorough examination that had been made of the exceptionally voluminous record. The order of July 1, 1930, was to go into effect on October 1, 1930, but because of mechanical difficulties in the preparation and printing of the tariffs, containing the great number of the revised rates, the effective date was postponed from time to time.

In September, 1930, the carriers asked for a rehearing, which was denied in November, 1930. Prior to its denial, a statement was submitted to the Commission on behalf of the Western Association of Railway Executives, directing attention to the serious financial condition of the carriers. A further petition for rehearing was presented to the Commission on February 18, 1931. This petition described in great detail the situation then existing. The carriers alleged that since the closing of the record before the Commission in September, 1928, there had been material and important changes in the operating, traffic and transportation conditions in the Western District which affected adversely the revenues of the carriers, and that, regardless of the question of the validity and propriety of the order when made, it would no longer be valid and proper in the light of the existing circumstances. The carriers alleged and offered to prove that, if the order became effective, it would reduce the gross and net operating revenues of the carriers in the Western District not less than $20,000,000 annually; that

their aggregate revenues in the first eleven months of 1930 were 14.92 per cent. lower than in the corresponding period of 1929; that the complete figures in respect of the revenues for December, 1930, were not yet available but that the volume of traffic then carried was substantially less than that of December, 1929; that the revenue freight car loadings in January, 1931, showed a substantial decline (14.06 per cent) from those of 1930 and an even greater decline (20.98 per cent) as compared with those of 1929; that the net operating income of these carriers for 1930 was over $100,000,000 less than their average annual net operating income for the five preceding years; that the changes in conditions since the record before the Commission was closed had been such as seriously to impair the credit of the carriers; that not only had the market price of their common and preferred stock declined to such a level that it would be impossible for them to secure additional capital through the sale of stock, but that their bond issues also in many instances had ceased to command the credit which they formerly enjoyed; that the decrease of railroad earnings had been such as to jeopardize the eligibility of these bonds for saving bank investments; and that there had been a large decline in the holdings of the securities of these carriers by both savings banks and life insurance companies; and that if the order of the Commission should become effective, it would, under the conditions then present, threaten the maintenance of an adequate system of transportation. In support of their allegations as to changed conditions, the petitioners submitted many other facts and statistical tables of traffic and revenues.

The Commission denied the application for rehearing on March 3, 1931. On April 10, 1931, the Commission made its supplemental report and order, modifying and supplementing in certain particulars its original report and order, and provided that the order as thus modified should become effective on June 1, 1931. Thereupon, these suits were brought.

The petition in the carriers' suit challenged the order as having been made in disregard of the provisions of the Interstate Commerce Act. The original and supplemental reports of the Commission, and the above-mentioned petitions for rehearing, were annexed to the petition and made a part of it. Reference was made to the statement of the Commission, in its special report of January 21,

1931, to the Senate Committee on Interstate and Foreign Commerce, that the railroads had "never been able, since 1920, to obtain the aggregate earnings contemplated by section 15a" (of the Interstate Commerce Act) "and they are faced with continually increasing competition from other forms of transportation." Reciting earlier orders of the Commission bearing upon rates for the transportation of grain and grain products,[5] the carriers averred that the order of the Commission was a complete reversal of its previous action; that the Commission had found that the revenue of the carriers for the Western District from the carriage of grain and grain products amounted to 12.1 per cent. of their total revenues in 1924, that year being used in the report as representative, and that the effect of the order in question would be to reduce the general level of rates on this traffic approximately 18 per cent, causing a serious diminution (to the amount of $20,000,000 annually) in the gross and net operating income of these carriers. The petition set forth the passage of the Hoch-Smith Resolution and the order of the Commission in relation to the rates on deciduous fruits from California, which had been held by this Court to be invalid because based upon an erroneous construction of the Resolution,[6] and the carriers charged that in making the reports and order here in question, the Commission had proceeded upon a like misconception of its powers. Stating the substance of their petition (February, 1931) for rehearing, the carriers further charged that the denial of that petition, in view of changed conditions, was itself an abuse of administrative discretion and, by depriving the carriers of the hearing to which they were entitled, constituted a denial of due process in violation of the Fifth Amendment of the Constitution of the United States.

In their answers, the United States and the Commission denied that the action of the Commission was in any respect unauthorized

[5] Increased Rates, 1920, 58 I. C. C. 220; Rates on Grain, Grain Products and Hay, 64 I. C. C. 85; Reduced Rates, 1922, 68 I. C. C. 676; Rates on Grain, Grain Products and Hay, 80 I. C. C. 362; Kansas Public Utilities Commission *v.* A. T. & S. F. Ry. Co., 83 I. C. C. 105; Rates and Charges on Grain and Grain Products, 91 I. C. C. 105.

[6] California Growers' and Shippers' Protective League *v.* Southern Pacific Company, 129 I. C. C. 25; 132 *Id.* 582; Ann Arbor Railroad Company *v.* United States, 281 U. S. 658.

or unlawful, and on the contrary alleged that the Commission had carefully considered the evidence before it in the light of its experience and that the evidence fully supported its order.

On the application for an interlocutory injunction, the evidence taken before the Commission was not presented to the District Court. Affidavits were submitted by the carriers which were addressed to the effect of the order upon their revenues. The District Court made findings of fact, reciting the findings set forth in the report of the Commission and, in the view that these were conclusive in the absence of the evidence, and that no errors of law had been committed, the application was denied.

The appellants contest this conclusion, contending that the report of the Commission and concurring opinions of Commissioners disclosed that the Commission had misapprehended its authority under the Hoch-Smith Resolution and that the Commission had failed to make the findings which were essential to support its decision under the applicable law; that this was shown by the special and extended consideration given by the Commission to the depression of agriculture and the lack of other and proper foundation for the order; that the Commission had not performed its duty to consider and apply the provisions of section 15a of the Interstate Commerce Act and had exceeded its power by resorting to different standards from those established by sections 1 and 15 of the Act; and that the ultimate finding of the Commission, expressed in the words of the statute, that the existing rates were unreasonable to the extent that they exceeded the rates prescribed, was not in itself sufficient to support the order, as it otherwise appeared to have been erroneously based.

We do not find it to be necessary to consider these contentions, and the counter arguments advanced on behalf of the Commission, or to review the Commission's reports, as it is sufficient for the present purpose to deal with the fundamental question presented by the action of the Commission in denying the appellants' second application for a rehearing. Ordinarily, a petition for rehearing is for the purpose of directing attention to matters said to have been overlooked or mistakenly conceived in the original decision and thus invites a reconsideration upon the record upon which that decision rested. The second petition for rehearing, in this proceeding, was not of that character. It was of the nature

of a supplemental bill. It presented a new situation, a radically different one, which had supervened since the record before the Commission had been closed in September, 1928. It asserted that whatever might be the view of the order when made, and upon that record, a changed economic condition demanded reopening and reconsideration. The carriers insisted upon this reopening as a right guaranteed to them not only by the Act of Congress but by the Constitution itself.

There can be no question as to the change in conditions upon which the new hearing was asked. Of that change we may take judicial notice. It is the outstanding contemporary fact, dominating thought and action throughout the country. As the Interstate Commerce Commission said in its recent report to the Congress,[7] "a depression such as the country is now passing through is a new experience to the present generation". The Commission also recognized in that report "the very large reductions in railroad earnings which have accompanied the economic depression", and stated that "the chief cause of these reductions has been loss of traffic". For "in such depressions the railroads suffer severely. Their traffic is a barometer of general business conditions".[8]

It is plain that a record which was closed in September, 1928—relating to rates on a major description of the traffic of the carriers in a vast territory—cannot be regarded as representative of the conditions existing in 1931. That record pertains to a different economic era and furnishes no adequate criterion of present requirements. While the effects of the widespread economic disturbance have had a progressive manifestation, they had been sufficiently revealed in February, 1931, when the second petition for rehearing was made, to compel the conclusion that the record of 1928 afforded no sufficient basis for the order of the Commission. The facts were set forth in the carriers' petition. They pointed out the grave reductions, in traffic and earnings, from which they were suffering, that their net operating income for 1930 was over $100,000,000 less than their average annual net operating income for the five years preceding, and that their credit was seriously impaired. At the time of this petition, the order revising the rates on

[7] 45th Annual Report, December 1, 1931; House Doc. No. 30, 72d Cong., 1st Sess., p. 114.

[8] *Id.*

grain and grain products in the Western District had not yet become effective, but the Commission stood upon the record of 1928 and, without reopening the proceeding or taking further evidence, provided that its order should become effective on June 1, 1931. In justification of this course, it is urged on behalf of the Commission that its determination had been reached after regularly conducted and protracted hearings in which carriers and shippers had cooperated and that the adjustments related not only to the level of rates but to the relation of rates and to discriminatory and wasteful practices, and that a reopening would have meant further lengthy proceedings. It is said that 'in performing its legislative function of prescribing reasonable rates, the Commission necessarily projects into the future the results of a decision based on the conditions disclosed in the record', and that its determination 'cannot reflect accurately fluctuating conditions'. These suggestions would be appropriate in relation to ordinary applications for rehearing, but are without force when overruling economic forces have made the record before the Commission irresponsive to present conditions. This is not the usual case of possible fluctuating conditions but of a changed economic level. And the prospect that a hearing may be long does not justify its denial if it is required by the essential demands of justice.

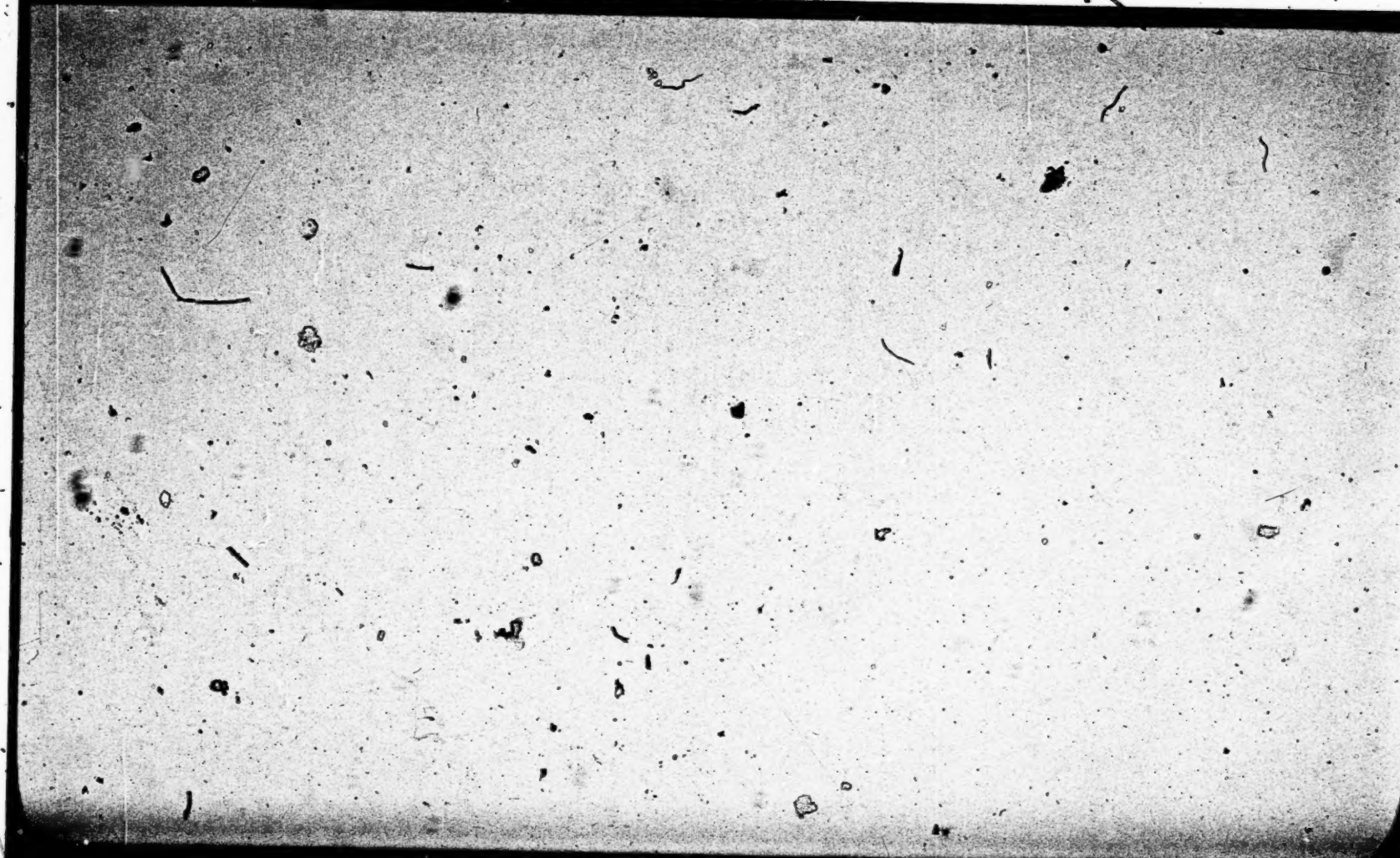
We are thus brought to the fundamental considerations governing the authority of the Commission. It has broad powers and a wide extent of administrative discretion, with the exercise of which, upon evidence, and within its statutory limits, the courts do not interfere. The important and salutary functions of the Commission to enforce public rights are not to be denied or impaired. But the Commission, exercising a delegated regulatory authority which does not have the freedom of ownership, operates in a field limited by constitutional rights and legislative requirements. Its duty under sections 1 (5), 3 (1) and 15 (1) of the Interstate Commerce Act with respect to the prescribing of reasonable rates and the preventing of unreasonable or unjustly discriminatory or unduly preferential practices, has not been changed by the Hoch-Smith Resolution. *Ann Arbor Railroad Company* v. *United States*, 281 U. S. 658, 669. The legal standards governing the action of the Commission in determining the reasonableness of rates are unaltered. In the discharge of its duty, a fair hearing is a funda-

mental requirement. *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Company*, 227 U. S. 88, 91. In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied. We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right. The order of the Commission which was thus made effective, and the ensuing supplemental order, cannot be sustained.

The order of the District Court refusing an interlocutory injunction is reversed, and the cause is remanded with direction to grant the injunction as prayed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.